DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-7822
Title: Walter Fernandez, Petitioner
v.
California
Docketed: December 20, 2012
Lower Ct: Court of Appeal of California, Second Appellate District
Case Nos.: (B232277)
Decision Date: August 1, 2012
Discretionary Court
Decision Date: October 31, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Dec 17 2012	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due January 22, 2013)
Jan 2 2013	Waiver of right of respondent California to respond filed.
Jan 17 2013	DISTRIBUTED for Conference of February 15, 2013.
Feb 4 2013	Response Requested . (Due March 6, 2013)
Feb 28 2013	Order extending time to file response to petition to and including April 5, 2013.
Apr 3 2013	Brief of respondent California in opposition filed.
Apr 17 2013	DISTRIBUTED for Conference of May 9, 2013.
May 13 2013	DISTRIBUTED for Conference of May 16, 2013.
May 20 2013	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jun 7 2013	Motion to appoint counsel filed by petitioner Walter Fernandez.
Jun 12 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including July 31, 2013.
Jun 12 2013	The time to file respondent's brief on the merits is extended to and including September 25, 2013.
Jun 25 2013	Motion DISTRIBUTED for Conference of June 26, 2013.
Jun 27 2013	Motion to appoint counsel filed by petitioner GRANTED. Gerald P. Peters, Esquire, of Thousand Oaks, California, is appointed to serve as counsel for the petitioner in this case.
Jul 31 2013	Joint appendix filed. (Statement of costs filed.)
Jul 31 2013	Brief of petitioner Walter Fernandez filed.
Aug 7 2013	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.

Aug 19 2013	CIRCULATED.
Aug 20 2013	SET FOR ARGUMENT on Wednesday, November 13, 2013
Sep 19 2013	Record received from Court of Appeal of California, 2nd Appellate District.(1 box)
Sep 25 2013	Brief of respondent California filed. (Distributed)
Oct 2 2013	Brief amicus curiae of United States filed. (Distributed)
Oct 2 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 21 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 25 2013	Reply of petitioner Walter Fernandez filed. (Distributed)
Nov 13 2013	Argued. For petitioner: Jeffrey L. Fisher, Standord, Cal. For respondent: Louis W. Karlin, Deputy Attorney General, Los Angeles, Cal.; and Joseph R. Palmore, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

No. 12-7822

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
DEC 17 2012
OFFICE OF THE CLERK

Walter Fernandez,

Petitioner

v.

The State of California,

Respondent

On Petition for a Writ of Certiorari
To The California Court of Appeal, Second Appellate District, Division Four

PETITION FOR WRIT OF CERTIORARI

Gerald P. Peters, Esq.
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Attorney for Petitioner
Walter Fernandez

Question Presented For Review

Proper interpretation of *Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), specifically whether a defendant must be personally present and objecting when police officers ask a co-tenant for consent to conduct a warrantless search or whether a defendant's previously-stated objection, while physically present, to a warrantless search is a continuing assertion of 4th Amendment rights which cannot be overridden by a co-tenant.

Parties to the Proceedings

The parties to the proceedings in the California Court of Appeal are the State of California and petitioner Walter Fernandez. There are no parties to the proceedings other than those named in the petition.

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Opinions Below

The unpublished opinion of the California Court of Appeal, which is the subject of this petition, was filed on August 1, 2012, and is attached as Appendix A. The California Supreme Court's one-page order denying review is attached as Appendix B.

Jurisdiction

The decision of the California Court of Appeal to be reviewed was filed on August 1, 2012. The California Supreme Court denied discretionary review on October 31, 2012. This petition is filed within 90 days of that date. Supreme Court Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. section 1257(a).

Constitutional Provisions Involved

Federal Constitutional Provisions

The 4th Amendment of the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The 14th Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Statement of the Case

Petitioner Walter Fernandez was charged by Information with committing the offenses of robbery (Cal. Pen., § 211), infliction of corporal injury on a cohabitant (§ 273.5(a)), felon in possession of a firearm (§ 12021(a)(1), possession of a concealed weapon (§ 12020(a)(1)), and felon in possession of ammunition (§ 12316(b)(1)). With respect to the robbery offense, it was alleged that petitioner used a knife during the commission of the offense. (§ 12022(b)(1).) As to all counts, other than infliction of corporal injury on a cohabitant, it was also alleged that the offenses were committed for the benefit of a street gang (§ 186.22(b)(1)(C)) and that petitioner previously served three prior prison terms within the meaning of section 667.5(b). (CT 90-94.)

On October 8, 2010, petitioner pled no contest to counts 3 through 5, and the gang allegation was stricken as to those counts. (CT 222.)

On October 25, 2010, a jury found petitioner guilty of robbery and infliction of corporal injury on a cohabitant. As to the robbery offense, the

jury found true both the gang allegation and an allegation Fernandez used a knife in the commission of the crime. (CT 339-340.)

On March 11, 2011, Fernandez was sentenced to a total term of 14 years. The court imposed a term of 14 years on count 1 [robbery], consisting of the middle term of 3 years, plus 10 years for the gang enhancement and 1 year for the weapon enhancement. The court imposed concurrent sentences of 3 years on count 1, 2 years on count 3, 2 years on count 4, and 2 years on count 5. The court struck the prior prison term enhancements. (CT 406, 407, 428.)

On April 11, 2011, Fernandez filed a timely notice of appeal. (CT 431.) On August 1, 2012, appellant's conviction was affirmed by the California Court of Appeal, 2nd District, Division 4. (App. A.) Petitioner petitioned for discretionary review by the California Supreme Court. On October 31, 2012, that court denied review in an order stating "The petition for review is denied." (App. B.)

Reasons for Granting the Writ

Review is required to determine the proper interpretation of the Court's decision in *Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208, *supra*, specifically whether a defendant must be personally present and objecting when police officers ask a co-tenant for consent to conduct a warrantless search or whether a defendant's previously-stated objection,

while physically present, to a warrantless search has continuing vitality and cannot be overridden by a co-tenant.

A conflict exists as to whether a constitutional objection, once asserted, has continuing vitality or whether, once the defendant is absent from the residence (and not removed by law enforcement personnel for the express purpose of avoiding defendant's assertion of constitutional rights), the defendant's assertion of constitutional rights can be overridden by a co-tenant.

I. THERE IS A CONFLICT AMONG FEDERAL AND STATE COURTS AS TO WHETHER A DEFENDANT'S PREVIOUSLY-STATED OBJECTION TO A SEARCH IS OVERRIDEN BY A CO-HABITANT'S CONSENT IF THE OBJECTING DEFENDANT IS NOT PHYSICALLY PRESENT WHEN CONSENT IS SOUGHT FROM THE CO-HABITANT

In this case, Fernandez, after objecting to police officers entering his apartment, was arrested and removed. Thereafter, Roxanne Rojas, a co-tenant, consented to a search. There is a substantial conflict among federal and state courts as to whether or not the search after Fernandez' objection is constitutionally permissible.

In *Georgia v. Randolph* 547 U.S. 103, 114, *supra*, the Supreme Court held that, while an occupant may have the right to consent to police entry and search, that consent cannot override the objection of a present, non-consenting co-occupant.

> Since the co-tenant wishing to open the door to a third party has no authority in law or social practice over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all. Accordingly . . . the cooperative occupant's invitation adds nothing to the government's side to counter the force of an objecting individual's claim to security against the government's intrusion into his dwelling place.

(*Id.* at pp. 114-115.)

Though *Randolph* concerned a "present and objecting co-tenant," it made clear that consent of one tenant would not be valid where the non-consenting tenant was arrested or removed from the scene of the present colloquy for the purpose of presenting an objection from being asserted. (*Id.* at p. 121.)

A conflict exists among federal and state courts regarding proper interpretation of *Randolph*. Some courts conclude that, under *Randolph*, a co-tenant who objects, but is thereafter arrested and removed from the scene (although not for the purpose of preventing an objection), does not lose his constitutional objection when a co-tenant consents to a police entry and search. Other courts hold that, once the objecting defendant is arrested and removed, his objection can be overridden by the consent of a co-tenant.

The 9th Circuit Court of Appeal holds that a search conducted after a co-tenant's objection violates the 4th and 14th Amendments to the Federal Constitution. In *United States v. Murphy*, 516 F.3d 1117, 1124 (9th Circuit 2008), the 9th Circuit states, "[W]hen a co-tenant objects to a search and another party with common authority subsequently gives consent to that

search in the absence of the first co-tenant the search is invalid as to the objecting co-tenant." Further, "Nor, more generally, do we see any reason to limit the *Randolph* rule to an objecting tenant's removal by police. Once a co-tenant has registered his objection, his refusal to grant consent remains effective barring some objective manifestation that he has changed his position and no longer objects." (*Id.* at p. 1125.) *Murphy* reasoned, "If the police cannot prevent a co-tenant from objecting to a search through arrest, surely they cannot arrest a co-tenant and then seek to ignore an objection he has already made." (*Id.* at pp. 1124-1125.)

In *Murphy*, the government attempted to distinguish *Randolph* because, since the defendant had been arrested, "the objecting co-tenant was not physically present when the other tenant gave consent to the search." (*Id.* at p. 1124.) *Murphy* saw no reason "why Murphy's arrest should vitiate the objection he had already registered to the search." (*Ibid.*) See also, *Richardson v. City of Antioch*, 722 F.Supp.2d 1133, 1140-1141 (N.D.Cal. 2010) and *Martin v. United States*, 952 A.2d 181, 187, 188 (D.C. 2008) which reach the same result.

This rule was also followed by an Oregon Court of Appeals in *State v. Caster*, 236 Ore.App. 214 (Or. 2010). *Caster*, noting that *Randolph* emphasized the "narrowness" of its holding, observed that nothing in the *Randolph* opinion "hints that a different result would have obtained had Mr. Randolph been arrested immediately after his objection" and that "at no point

did the court suggest that . . . police had the option of simply arresting the defendant and then seeking the co-occupant's consent – something of a glaring omission, given the potential significance of the exception and the depth of treatment given to other hypothetical fact patterns." (*Id.* at pp. 232-233.)

In contrast, several federal circuits have reached the opposite conclusion, concluding that, unless the defendant is personally present at the precise moment consent is sought from a co-habitant, the defendant's objection is overridden by the co-habitant's consent. *See, United States v. Shrader*, 675 F.3d 300 (4th Cir. 2012); *United States v. Cook*, 674 F.3d 491 (5th Cir. 2012); *United States v. Hicks*, 539 F.3d 566 (7th Cir. 2008); *United States v. Henderson*, 536 F.3d 776 (7th Cir. 2008); *United States v. Hudspeth*, 518 F.3d 954 (8th Cir. 2008) [en banc]; *United States v. Folster*, 654 F.Supp.2d 389 (E.D.N.C. 2009). State courts in Colorado, New Jersey, and Wisconsin agree. See, *State v. Strimple*, 267 P.3d 1219, 2012 Co. 1 (Colo. 2012); *State v. Lamb*, 2012 WL 2427947 (N.J.Super.A.D. 2012); *State v. St. Martin*, 334 Wis.2d 290, 800 N.W.2d 858 (Wis. 2011).

For example, *Hudspeth* concluded that, since the defendant was arrested and removed before his wife consented to a search of their residence, defendant's objection was overruled by his wife's subsequent consent.

> [W]e note that when Mrs. Hudspeth consented to the seizure of their home computer, Hudspeth already had been arrested and jailed for possession of child pornography. . . [¶] . . . Hudspeth was not

> at the door and objecting and does not fall within *Randolph*'s "fine line." Thus, we must conclude Cpl. Nash's failure to advise Mrs. Hudspeth of her husband's earlier objection to a search of the home computer did not convert an otherwise reasonable search into an unreasonable.

(518 F.3d at pp. 959-960.)

In *Henderson*, the 7th Circuit framed the question as follows, "Among the questions left unanswered by *Randolph* is the one presented here: Does a refusal of consent by a 'present and objecting' resident remain effective to bar the voluntary consent of another resident with authority after the objector is arrested and removed and is no longer 'present and objecting'?" (536 F.3d at p. 781.) The Court concluded that defendant's removal from the scene, by his arrest, ended his objection.

> Here, it is undisputed Henderson objected to the presence of the police in his home. One he was validly arrested for domestic battery and taken to jail, however, his objection lost its force, and Patricia was free to authorize a search of the home. This she readily did. Patricia's consent rendered the warrantless search reasonable under the Fourth Amendment. . .

(536 F.3d at p. 785.)

But, strong dissents were raised in cases decided by the 7th (*Henderson*) and 8th (*Hudspeth*) Circuits, as well as the decisions of the Supreme Courts of Colorado (*Strimple*) and Wisconsin (*St. Martin*). See, *United States v. Henderson*, 536 F.3d 776, 785-788, *supra*, Rovner, C.J., dis.; *United States v. Hudspeth*, 518 F.3d 954, 961-965, *supra*, Melloy, C.J., Wollman, C. J., and Bee, C.J., dis.; *State v. Strimple*, 267 P.3d 1219, 1227-1229, *supra*, Bender,

C.J., dis.; *State v. St. Martin*, 334 Wis.2d 290, 315-323, 800 N.W.2d 858, 870-874, J. Bradley and Abrahamson, C.J., dis.

For example, in *Hudspeth*, Judge Melloy wrote, in dissent:

> Notably, none of Supreme Court's relevant co-tenant consent jurisprudence presented a factual scenario identical to that presented in the instant case. The differences between the cases are plain. In *Matlock* and *Rodriguez*, the co-tenant challenging the admission of evidence against him never voiced an objection to the warrantless search. . . . Randolph, of course, objected to the warrantless search of his home . . . , as did Hudspeth. Randolph objected while standing at the threshold of the shared residence. . . whereas Hudspeth's objection occurred off-site. The question is whether these differences are of constitutional import. The majority glosses over the difference between lack of consent and express objection, and instead focuses on geography, concluding that the location of a defendant, not whether he expressly objects, is determinative. Mindful that the Supreme Court "decides[s] the case before [it], not a different one," . . . I reach a contrary conclusion. . . . I conclude a warrantless search conducted despite the timely express objection of a co-tenant of equal status cannot be considered reasonable, regardless of where the objection occurs.

518 F.3d at p. 962. Similarly, in *United States v. Henderson*, 536 F.3d 776, 785-786, Justice Rovner wrote in dissent.

> There is only one reason that this case is not on all fours with *Georgia v. Randolph*: When Kevin Henderson told the police to "get the fuck out" of his house, the officers arrested and removed *him* instead. Henderson was both a present and actual objector to the search of his home. Had he remained on the premises, his objection would have foreclosed the police from searching the house

> regardless of his wife's consent. . . . My colleagues conclude that Henderson's valid arrest and removal from the scene sapped his objection of its force and allowed the police to search the house with Patricia Henderson's consent. . . . I would hold that Henderson's objection survived his involuntary removal from the home, thus precluding the search in the absence of a warrant. . .

(Emphasis in original.)

Likewise, in *State v. Strimple*, 267 P.3d 1219, 1228, *supra*, decided by the Colorado Supreme Court, Chief Justice Bender dissented, "I find the Ninth Circuit's impeccable logic and reasoning persuasive and in line with the letter and purpose of the Fourth Amendment, exceptions to which are 'jealously and carefully drawn.' . . . . There is no reason that Strimple's arrest should vitiate the objection he had already raised to the search." (Citation omitted.) Similarly, in *State v. St. Martin*, 800 N.W.2d 858, 870-871, *supra*, Justice Bradley, of the Wisconsin Supreme Court, dissented:

> The majority appears, at times, to construe "physically present" to mean that the objecting inhabitant must be standing squarely under the doorframe when he registers his objection to the search. To the extent the majority limits the holding from *Randolph*, it endorses a test that will yield arbitrary results and impermissibly affords citizens fewer Fourth Amendment protections than does the United States Supreme Court.
>
> Contrary to the majority, I conclude that this case falls squarely within the rule enunciated in *Randolph*. Because I determine that St. Martin was physically present when he refused to consent to the search, I respectfully dissent.

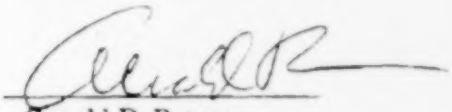
A deep and irreconcilable split has developed among federal and state courts as to proper application of *Randolph's* rule. Review is required to resolve this split.

II. CONCLUSION

For the foregoing reasons, petitioner requests that the Court grant this petition for a writ of certiorari to review the judgment and opinion of the California Court of Appeal, Second Appellate District, affirming his sentence.

Dated: December 14, 2012

Respectfully submitted,



Gerald P. Peters
Attorney for Petitioner
Walter Fernandez

APPENDIX A

Filed 8/1/12

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. WALTER FERNANDEZ, Defendant and Appellant.	B232277 (Los Angeles County Super. Ct. No. BA363324)

APPEAL from a judgment of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed in part, reversed in part with directions.

Steven A. Brody and Gerald Peters, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey, Shawn McGahey Webb, and Louis W. Karlin, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts II, III, and IV of the Discussion.

A jury convicted defendant Walter Fernandez of second degree robbery (Pen. Code, § 211) (count 1)[1] and willful infliction of corporal injury on a spouse, cohabitant, or child's parent (§ 273.5, subd. (a)) (count 2); as to count 1, the jury further found that (1) in the commission of the offense, the defendant personally used a dangerous and deadly weapon, to wit, a knife, within the meaning of section 12022, subdivision (b)(1), and (2) the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang, within the meaning of section 186.22, subdivision (b)(1). Defendant pled nolo contendere to possession of a firearm by a felon (§ 12021, subd. (a)(1))[2] (count 3), short barreled shotgun or rifle activity (§ 12020, subd. (a)(1))[3] (count 4), and possession of ammunition (§ 12316, subd. (b)(1))[4] (count 5). The trial court imposed a sentence of 14 years.

In this appeal from the judgment, defendant contends: (1) the trial court erred in denying his motion to suppress evidence seized during a warrantless search of his apartment; (2) the trial court abused its discretion by admitting evidence that a suspect was arrested for attempted murder in defendant's apartment; (3) there was insufficient evidence to support the true finding on the gang allegation; and (4) the trial court erred in denying defendant's *Pitchess*[5] motion.

In the published portion of the opinion, we conclude the trial court properly denied defendant's suppression motion. In the unpublished portion, we reject defendant's remaining claims, with the exception of his contention of *Pitchess* error. We

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1 All further statutory references are to the Penal Code.

2 Section 12021, subdivision (a)(1) was repealed and replaced by section 29800 without substantive change. (Stats. 2010, ch. 711, § 6, operative Jan. 1, 2012.)

3 Section 12020, subdivision (a)(1) was repealed and replaced by section 33215 without substantive change. (Stats. 2010, ch. 711, § 6, operative Jan. 1, 2012.)

4 Section 12316, subdivision (b)(1) was repealed and replaced by section 30305 without substantive change. (Stats. 2010, ch. 711, § 6, operative Jan. 1, 2012.)

5 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

conditionally reverse the section 273.5, subdivision (a) conviction for the trial court to conduct an in camera review of one officer's personnel file; in all other respects, we affirm the judgment.

STATEMENT OF FACTS

I. Prosecution Case

A. Percipient Testimony

1. Abel Lopez

On October 12, 2009, at about 11:00 a.m., Abel Lopez was approached after cashing a check near the corner of 14th Street and Magnolia in Los Angeles by a man with light skin, a grey sweater, and a tattoo on his bald head. The man, whom Lopez later identified as defendant, asked what neighborhood Lopez was from. Lopez said, "I'm from Mexico." Defendant laughed and said Lopez was in his territory and should give him his money. He then said, "The D.F.S. rules here. They rule here." Defendant took a knife out of his pocket and pointed it towards Lopez's chest. Lopez put up his hands to protect himself and defendant cut Lopez's wrist.

Lopez tried to run away and, while running, took out his cell phone and called 911. He told the 911 operator he needed help because someone wanted to kill him. Defendant then whistled loudly and three or four men ran out of a building on 14th Street and Magnolia. They hit Lopez in the face and all over his body, knocking him to the ground, where they continued to hit and kick him. When he got up, Lopez did not have his cell phone or wallet.[6] He saw the men running back to the building from which they had come. As a result of the attack, Lopez suffered a deep cut on his left wrist and bruising and swelling over his body.

Several minutes after the attack, the police and paramedics arrived. Lopez participated in a field showup, where he identified defendant.

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[6] Lopez told police he had approximately $400 in his wallet.

2. Detective Clark and Officer Cirrito

Detective Kelly Clark and Officer Joseph Cirrito responded to a police radio dispatch on October 12, 2009. Because the police dispatcher indicated possible involvement by members of the Drifters gang in an assault with a deadly weapon, Clark and Cirrito drove to an alley near Magnolia and 14th Street where they knew Drifters gathered. As they stood in the alley, two men walked by and one said, "[T]he guy is in the apartment." The speaker appeared very scared and walked away quickly. When he returned, he again said, "He's in there. He's in the apartment." Immediately thereafter, the detectives saw a tall, light-skinned, Hispanic or white male wearing a light blue t-shirt and khaki pants run through the alley and into the house where the witness was pointing. The house had been restructured into multiple apartments and was a known gang location. A minute or so later, the officers heard sounds of screaming and fighting from the apartment building into which the suspect had run.

Clark and Cirrito called for backup and, once additional officers arrived, knocked on the door of the unit from which they had heard screaming. The door was opened by Roxanne Rojas, who was holding a baby and appeared to be crying. Her face was red and she had a big bump on her nose that looked fresh. She had blood on her shirt and hand that appeared to come from a fresh injury. Cirrito asked what happened and she said she had been in a fight. Cirrito then asked if anyone else was inside the apartment, and she said only her son. When Cirrito asked her to step outside so he could conduct a sweep of the apartment, defendant stepped forward. He was dressed only in boxer shorts and seemed very agitated. He said, "You don't have any right to come in here. I know my rights." Cirrito removed him from the residence and took him into custody.

While Cirrito and Clark arrested defendant at the rear of the house, two men ran out of the front of the house. Officers detained them for questioning.

After defendant was removed from the scene, officers secured the apartment. Clark then went back to Rojas, told her that defendant had been identified as a robbery suspect, and asked for Rojas's consent to search the apartment. Rojas gave consent, orally and in writing. During the ensuing search, officers found Drifters gang

paraphernalia, a butterfly knife, boxing gloves, and clothing, including black pants and a light blue shirt. None of the items stolen from the victim was ever found.

The officers interviewed Rojas about her injuries. She said that when defendant entered the apartment, she confronted him about his relationship with a woman named Vanessa. They argued, and defendant struck Rojas in the face. The officers also spoke to Rojas's four-year-old son, Christian, who told them defendant had a gun. Officers recovered a sawed-off shotgun from a heating unit where Christian told them it was hidden.

Two days later, Cirrito interviewed Rojas again. She said several times that she did not want to be a "rat" and that defendant would be very upset if he knew she was talking to the police. She denied that defendant struck her and said she had been struck in the face by Vanessa.

B. Expert Testimony

1. Defendant's Active Gang Membership

Cirrito testified for the prosecution as a gang expert, opining that defendant was an active member of the Drifters, a Latino street gang. He said that the Drifters began as a "car club," but moved into criminal activities in the 1980's. By the 1990's, they began to engage in more violent crimes, such as assaults, carjackings, attempted murders, and narcotics sales. As of October 2009, there were about 140 active Drifters members. In 2009, defendant told officers he had been a member of the Drifters (12th Street Bagos clique) for nine years.

The Drifters' territory includes a "stronghold" in the area between 14th Street and 15th Street, and between Hoover and Menlo. The stronghold is an area where gang members can retreat if there is danger, and from which members can escape through secret passageways.

Cirrito testified that defendant had at least four tattoos that indicated his affiliation with the Drifters: "D.F.S.," an abbreviation for Drifters, was tattooed on his leg; "Drifters" was tattooed on his back; "L.A." was tattooed on his chest; and a gas mask and

fedora were tattooed on his back. According to Cirrito, "[N]ot everyone that gets an 'L.A.' on there is a gang member, but there is a trend that gang members, especially the Latino gangs[,] will use that L.A. logo. It represents L.A. where they take a lot of pride [in] where they're from." Cirrito also testified that the gas mask and fedora represent an underground rap group called Psychoheads, which "talk[] a lot about weed, smoking weed and so on. It's an underground group, but they're very popular with the neighborhood gangsters. A lot of gang members will put that on because, again, it's — we talk about reputation and pride in the area. Psychoheads came from the Pico Union area, which is close by that particular area of the Drifters."

Cirrito testified that a "moniker" is a nickname typically given to a gang member. Defendant's moniker is "Blocks." The moniker "Blocks" appeared in a Drifters "roll call" (list of active gang members) on a water heater near defendant's apartment. "Blocks" also appeared in tagging on a garage door a few days after defendant's arrest, which read "D.F.S. [Drifters], Bagos, Block[s]." "Bagos" is the Drifters clique in the area in which defendant lives.

Cirrito testified that an art book recovered from defendant's bedroom on October 12, 2009, also evidences defendant's gang membership. Specifically, he noted that the book contains a roll call with monikers and references to "D.F.S. 13," "D.F.S. 12th Street, Bagos," "Blocks," "Rox," "Roxy, 12th Street," "Drifters," and "Drifters 13." Cirrito said that "13" indicates an affiliation with the Mexican mafia, the "M.A."

Cirrito testified that baseball caps were also recovered from defendant's living room following his arrest; one cap was brown, with "L.A." and "Drifters" written inside, and another was blue and embroidered with the name "Trigger," a documented Drifters member.

In summary, Cirrito opined that defendant was an active member of the Drifters because he had tattoos that reference the Drifters gang; he goes by the moniker "Blocks"; he admitted to officers that he has been a member of the Drifters; he had gang paraphernalia in his home; he lived in a Drifters stronghold; and during the incident for which he was arrested, he said, "Where are you from? D.F.S. rules here."

2. Cirrito's Opinion That the Robbery Was Gang-related

Cirrito testified that gang members care deeply about their gang's reputation in the community because "reputation means everything to them." He said that gangs want respect from rival gangs, but they also want to terrorize the neighborhoods in which they operate so people will be afraid to come forward and talk about the gang's criminal activities. A gang makes itself known in the community in several ways, primarily by committing crimes and tagging.

The Drifters establish their territory "[b]y committing crimes in — just open daylight. There's fear and intimidation . . . . [S]ome of these younger people . . . want to be gang members. Some of them, it's almost peer pressure. Some of them are actually forced because they live in that neighborhood. They get beat up. They're getting — I'll say attacked or pocket checked, and, eventually, they give in to just be part of this gang."

Cirrito opined that Drifters members individually and collectively engage in a pattern of criminal gang activity. Their primary activities are robbery, grand theft auto, assault with a deadly weapon, narcotics, and attempted murder.

The prosecutor asked Cirrito the following hypothetical: "I want you to assume that the location we're talking about is 14th and Magnolia, that it is twelve o'clock in the day, broad daylight for other people to see and that you have an individual who had recently been to a check cashing location or a similar location. He is leaving his girlfriend's house in that area, 14th and Magnolia. He's alone. He is approached by someone with a distinctive tattoo on the top of their head who is taller than that individual, that that person comes up to the man who is alone and asks that person, 'Where are you from?' That the person says — we'll call the smaller person the victim. He says, 'I'm not from anywhere. I'm from Mexico,' that the suspect says 'Drifters rule here,' in Spanish. 'This is Drifters, D.F.S.,' something to that effect multiple times, and the location is 14th and Magnolia. The suspect then demands the wallet of the victim and takes out a knife, points the knife at the victim, and the victim, in an attempt to defend himself, puts [his] wrist in front of [his] body, and the knife actually punctures through

the sweater into the wrist of the victim. The victim starts to run, at which point the suspect then whistles, and three to four additional presumably other gang members come to attack the victim. The victim calls 911 and is subsequently punched, kicked, beaten and has his wallet stolen, his Mexican ID is stolen, his cell phone is stolen, and the cash that he had recently cashed at the check cashing is taken. He sees the suspect with the knife and the tattoo along with the three to four others, then all flee, and he participates in a field showup and is able to identify the person with the tattoo, the person with the knife. His property is never recovered. Under that set of circumstances, would you believe, Officer, based on your background, training and experience, that that hypothetical, whether the act, the robbery itself, would be committed for the benefit of or at the direction of or in association with a criminal street gang, assuming that that particular location, 14th and Magnolia, was the stronghold of that gang with the specific intent to promote, further or assist in criminal conduct by gang members[?]"

Cirrito opined that, for the following reasons, he believed the hypothetical crime to be gang-related: "It almost falls under the definition of what a gang is. A gang has three or more people who formally or informally have a common name, sign[,] or symbol[,] who engage or have engaged individually or collectively in a crime that causes fear and intimidation within a community, and . . . one of the crimes under this definition of 186.22 is a robbery. And the fact that it was done in broad daylight in this gang location, it's very bold to do that in daylight. You must feel — that individual must feel that he has a lot of power in that community. That person must feel that . . . no one is going to rat me out. No one's going to tell them who I was. The idea that he whistles others, that it was premeditated, that they're waiting, they have this all set up, and that these three other individuals or four individuals assist this one individual in taking property of one person. To even go back on that, when that person walks up on this person and says, 'Where are you from?' For most citizens who live in this area, when they hear that, they know I'm getting banged on. He's asking me where I'm from. If you think about it, an individual — anybody that approaches you and you don't know who they are and they engage in a conversation, you get a little defensive like what does this person want?

Now, he's telling you 'Drifters rule here.' I'm basically now thinking — well, this person is thinking I'm either going to get robbed; I'm going to get jumped; beat up. I might even be killed because this guy's a gang member, and it's not just him that I have to fight. It's all — it's the gang. He's telling me he's from a gang, Drifters, for example. So in my opinion, this is for the benefit of a gang. The robbery itself — the cell phones could be used. They could change out the SIM card. They could be used for narcotics sales. They could be pawned off for a few bucks. The Mexican ID could be used to — for someone that doesn't have ID. They could change it. It could be used for fraud, identity theft. The $400 could be used for buying more narcotics. It could be for buying guns, weapons. It could be paying for books for people who have recently been incarcerated and are in jail and that they need books for phone calls and cigarettes and anything else that they need. So my feeling is that this crime was done for the benefit of a gang."

II. Defense Case

Roxanne Rojas testified that on October 12, 2009, she and defendant were living together in the apartment where defendant was arrested. At about 11:00 a.m., defendant left the apartment to buy tacos and cigarettes; Rojas remained home with their two-month-old daughter and four-year-old son. While defendant was gone, a woman named Vanessa came to the apartment, and she and Rojas fought. Rojas and Vanessa were both injured during the fight. When defendant returned to the apartment through the back door, Vanessa left out the front door. Defendant saw that Rojas was injured and began to yell at her. Moments later, an officer arrived. The officer asked Rojas to let him in, and Rojas "didn't say yes. I didn't say no. I said let me get my children." Rojas agreed that defendant has a Drifters tattoo, but said he was no longer active in the gang.

Defendant testified that he had been involved with the Drifters earlier in his life. He was "forcibly jumped in" when he was 18 or 19 years old and he "had to basically like go with the flow." He was never heavily involved with the Drifters; "[i]t always was just about like simply like me living there . . . like I'm out there doing stuff in the

neighborhood . . . hanging out with people I grew up with." He admitted that he had been convicted of receiving stolen property and served time in prison. He said he was released in 2007 and turned his life around. He began working and got an apartment in Marina del Rey for himself, Rojas, and her son. When Rojas got pregnant with her second child, the family moved to a two-bedroom apartment on 15th Street and Magnolia, but he had nothing to do with the Drifters.

Defendant testified that on the morning of October 12, 2009, he woke up late, played with his son, and then went out to get tacos for the family. On 14th Street, he was approached by a Hispanic man who appeared to be drunk. The man said, "Crazy Riders," which is rival gang from the area. Defendant ignored him and kept walking. The man continued to talk to him and then "got into the point where he's coming at me." Defendant pushed him away, and the two men got into a fist fight. When it was over, defendant continued to the liquor store to buy cigarettes and then went home. Defendant never saw the man again. When he returned home, Rojas told him a girl had come to the house looking for him, and she and the girl had gotten into a fight. Defendant was upset that Rojas had let the girl in, and he and Rojas began yelling at one another. He did not hit Rojas during the argument. The police arrived a few minutes later and arrested him.

On cross-examination, defendant conceded that he has four prior felony convictions for theft-related crimes. He said "Blocks" or "Blockhead" is his nickname, but it is not a gang moniker.

III. Sentencing and Appeal

On October 8, 2010, defendant pled nolo contendere to counts 3, 4, and 5 (firearms and ammunition possession). In connection with defendant's plea, the parties agreed that defendant's son would not be called as a witness in the jury trial and the prosecution would not reference a gun seized at defendant's home after his arrest. On October 25, 2010, the jury convicted defendant of counts 1 and 2 (second degree robbery and corporal injury on a spouse, cohabitant, or child's parent); as to count 1, the jury further found that (1) in the commission of the offense, defendant had personally used a

dangerous and deadly weapon, and (2) the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang.

As to count 1, the court sentenced defendant to 14 years (midterm of three years, plus an additional consecutive term of 10 years pursuant to § 186.22, subd. (b)(1)(A), plus an additional term of one year pursuant to § 12022, subd. (b)(1)). As to count 2, the court sentenced defendant to the midterm of three years, to run concurrent with the principal term. As to counts 3, 4, and 5, the court sentenced defendant to the midterm of two years, to run concurrent with the principal term.

Defendant timely appealed.

DISCUSSION

Defendant contends: (1) the trial court erred by denying his motion to suppress evidence seized in his apartment during a warrantless search; (2) the trial court abused its discretion by admitting evidence that a suspect was arrested for attempted murder in defendant's apartment; (3) there was insufficient evidence to support the true finding on the gang allegation; and (4) the trial court erred by denying defendant's *Pitchess* motion. We consider these issues below.

I. The Trial Court Did Not Err by Denying Defendant's Motion to Suppress

Prior to trial, defendant filed a motion pursuant to section 1538.5 to suppress evidence seized during a warrantless search of his apartment following his arrest. Specifically, defendant sought to exclude (1) a Mossberg New Haven 20-gauge shotgun, (2) Remington 20-gauge shotgun ammunition, (3) a knife with a four and a half-inch stainless steel blade, (4) any currency seized during the search, and (5) any other evidence seized, including clothing, notebooks, and boxing gloves. The trial court denied the motion to suppress. We review the order de novo to determine whether, on the facts found by the trial court on the basis of substantial evidence, the search or seizure was

reasonable under the Fourth Amendment. (*People v. Duncan* (2008) 160 Cal.App.4th 1014, 1017.)

Defendant contends that the trial court erred by denying the motion to suppress, noting that the officers did not obtain a search warrant and he objected to their entry into his apartment. Citing *Georgia v. Randolph* (2006) 547 U.S. 103, 114 (*Randolph*), and *United States v. Murphy* (9th Cir. 2008) 516 F.3d 1117 (*Murphy*), he urges that Rojas's subsequent consent to a search of their apartment was invalid and any evidence obtained was inadmissible. The Attorney General disagrees, contending that Rojas's consent provided a constitutionally permissible basis for the search once defendant was lawfully removed from the apartment.

We begin by discussing *Randolph*, in which the United States Supreme Court held that police officers may not constitutionally conduct a warrantless search of a home over the express refusal of consent by a physically present resident, even if another resident consents to a search. We then discuss the split of authority among the federal circuit courts as to *Randolph's* application to a case like the present one, where consent to search is given by a defendant's cotenant after the defendant is arrested and removed from the residence. We conclude that under the circumstances of the present case, the search was lawful.

A. Georgia v. Randolph

In *Randolph*, *supra*, 547 U.S. 103, defendant's wife, Janet Randolph, called police to the family home and complained that her husband was a cocaine user. An officer asked defendant's permission to search the house; he refused. The officer then sought Mrs. Randolph's consent to search, which she gave. In defendant's bedroom, the officer discovered cocaine and drug paraphernalia. (*Id.* at p. 107.)

Defendant moved to suppress the evidence as products of a warrantless search. (*Randolph*, *supra*, 547 U.S. at p. 107.) The Supreme Court granted certiorari "to resolve a split of authority on whether one occupant may give law enforcement effective consent

to search shared premises, as against a co-tenant who is present and states a refusal to permit the search." (*Id.* at p. 108.)

The court noted that to the Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person's house as unreasonable per se, "one 'jealously and carefully drawn' exception, *Jones v. United States*, 357 U.S. 493, 499, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958), recognizes the validity of searches with the voluntary consent of an individual possessing authority, [*Illinois v.*] *Rodriguez*, 497 U.S. [177,] 181, 110 S.Ct. 2793 [(1990)]. That person might be the householder against whom evidence is sought, *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), or a fellow occupant who shares common authority over property, when the suspect is absent, [*United States v.*] *Matlock*, [415 U.S. 164,] 170, 94 S.Ct. 988 [(1974)]." (*Randolph*, *supra*, 547 U.S. at p. 109.) The exception recognized in those cases "'does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.'" (*Id.* at p. 110.)[7]

The "constant element" in assessing Fourth Amendment reasonableness in the consent cases, the Supreme Court explained, is "the great significance given to widely shared social expectations, which are naturally enough influenced by the law of property,

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[7] In *Illinois v. Rodriguez*, *supra*, 497 U.S. at pages 179-180 (*Rodriguez*), defendant's girlfriend consented to an officer's entry into the apartment she and defendant shared, where defendant was then sleeping. The Supreme Court held that evidence seized during the warrantless search of the apartment could be introduced against defendant because the authorities reasonably believed his girlfriend had the authority to consent. (*Id.* at p. 189.) In *United States v. Matlock*, *supra*, 415 U.S. 164, 166, 177 (*Matlock*), the court held that evidence seized during a warrantless search of defendant's bedroom could be admitted against him because his girlfriend consented to the search; defendant's consent was neither sought nor obtained, although he was at the time of the search in police custody in the front yard of the home.

but not controlled by its rules. [Citation.] *Matlock* accordingly not only holds that a solitary co-inhabitant may sometimes consent to a search of shared premises, but stands for the proposition that the reasonableness of such a search is in significant part a function of commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other's interests." (*Randolph, supra*, 547 U.S. at p. 111.) Such an understanding includes an assumption tenants "usually make about their common authority when they share quarters. They understand that any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another. As *Matlock* put it, shared tenancy is understood to include an 'assumption of risk,' on which police officers are entitled to rely[.]" (*Ibid.*)

The situation differs, however, when a cohabitant is present and denying entrance: "[I]t is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out.' Without some very good reason, no sensible person would go inside under those conditions. . . . The visitor's reticence without some such good reason would show not timidity but a realization that when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority." (*Randolph, supra*, 547 U.S. at pp. 113-114.) "In sum, there is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders." (*Id.* at p. 114.)

Applying these principles, the court concluded that "[s]ince the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all." (*Randolph, supra*, 547 U.S. at p. 114.) It held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a *physically present resident* cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." (*Id.* at p. 120, italics added.)

The court then reaffirmed the continuing vitality of *Matlock* and *Rodriguez*, explaining as follows: "Although the *Matlock* defendant was not present with the opportunity to object, he was in a squad car not far away; the *Rodriguez* defendant was actually asleep in the apartment, and the police might have roused him with a knock on the door before they entered with only the consent of an apparent co-tenant. If those cases are not to be undercut by today's holding, we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.

"This is the line we draw, and we think the formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it. For the very reason that *Rodriguez* held it would be unjustifiably impractical to require the police to take affirmative steps to confirm the actual authority of a consenting individual whose authority was apparent, we think it would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if we were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received. There is no ready reason to believe that efforts to invite a refusal would make a difference in many cases, whereas every co-tenant consent case would turn into a test about the adequacy of the police's efforts to consult with a potential objector. Better to accept the formalism of distinguishing *Matlock* from this case than to impose a requirement, time consuming in the field and in the courtroom, with no apparent systemic justification. The pragmatic decision to accept the simplicity of this line is, moreover, supported by the substantial number of instances in which suspects who are asked for permission to search actually consent [fn. omitted], albeit imprudently, a fact that undercuts any argument that the police should try to locate a

suspected inhabitant because his denial of consent would be a foregone conclusion." (*Randolph, supra*, 547 U.S. at pp. 121-122.)

The case before it, the court concluded, "invites a straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant. Scott Randolph's refusal is clear, and nothing in the record justifies the search on grounds independent of Janet Randolph's consent. The State does not argue that she gave any indication to the police of a need for protection inside the house that might have justified entry into the portion of the premises where the police found the powdery straw (which, if lawfully seized, could have been used when attempting to establish probable cause for the warrant issued later). Nor does the State claim that the entry and search should be upheld under the rubric of exigent circumstances, owing to some apprehension by the police officers that Scott Randolph would destroy evidence of drug use before any warrant could be obtained." (*Randolph, supra*, 547 U.S. at pp. 122-123.)

B. United States v. Murphy

In *Murphy, supra*, 516 F.3d 1117, the Ninth Circuit extended *Randolph* to hold that if a defendant expressly withholds consents to search, a warrantless search conducted *after* the defendant has left or been removed from the residence is invalid even if a cotenant subsequently consents. In *Murphy*, the defendant was living in a storage unit rented by Dennis Roper. Officers arrested the defendant, who refused to consent to a search of the storage unit; later, they arrested Roper, who consented to a search. During the search, officers seized a methamphetamine lab.

The defendant challenged the validity of Roper's consent to the search. (*Murphy, supra*, 516 F.3d at pp. 1119-1120.) The Ninth Circuit held that the search violated the Fourth Amendment, rejecting the government's contention that the present case was distinguishable from *Randolph* because the defendant was not present when Roper consented to the search. It explained: "The . . . distinction that the government attempts to make between this case and *Randolph* is that in the former, unlike in the latter, the

objecting co-tenant was not physically present when the other tenant gave consent to the search. Here, Murphy refused consent and was subsequently arrested and removed from the scene. Two hours later, officers located Roper and obtained consent from him to search the units. Roper did not know that Murphy had previously refused consent and Murphy was not present to object once again to the second search. We see no reason, however, why Murphy's arrest should vitiate the objection he had already registered to the search. We hold that when a co-tenant objects to a search and another party with common authority subsequently gives consent to that search in the absence of the first co-tenant the search is invalid as to the objecting co-tenant.

"We find support for our holding in the *Randolph* Court's treatment of the related issue of police removal of a tenant from the scene for the purpose of *preventing* him from objecting to a search. [Citation.] The Court held that third party consent to a search is valid only '[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection.' [Citation.] If the police cannot prevent a co-tenant from objecting to a search through arrest, surely they cannot arrest a co-tenant and then seek to ignore an objection he has already made. Nor, more generally, do we see any reason to limit the *Randolph* rule to an objecting tenant's removal by police. Once a co-tenant has registered his objection, his refusal to grant consent remains effective barring some objective manifestation that he has changed his position and no longer objects. The rule that *Randolph* establishes is that when one co-tenant objects and the other consents, a valid search may occur only with respect to the consenting tenant. It is true that the consent of either co-tenant may be sufficient in the absence of an objection by the other, either because he simply fails to object or because he is not present to do so. Nevertheless, when an objection has been made by either tenant prior to the officers' entry, the search is not valid as to him and no evidence seized may be used against him. [Fn. omitted.] Rather, as in this case, in the absence of exigent circumstances, the police must obtain a warrant before conducting the search." (*Murphy, supra*, 516 F.3d at pp. 1124-1125.)

C. Subsequent Case Law

Four federal circuit courts and at least two state Supreme Courts have rejected the Ninth Circuit's analysis in *Murphy*; they hold that even if a defendant expressly refuses to allow officers to search his residence, a cohabitant's consent given after a defendant leaves or is lawfully removed will support a warrantless search. *United States v. Hudspeth* (8th Cir. 2008) 518 F.3d 954 (*Hudspeth*) is one such case. There, officers executed a search warrant at the defendant's workplace and discovered child pornography on the defendant's computer. The defendant was arrested for possession of child pornography. The arresting officer asked the defendant for permission to search his home computer; he refused. Law enforcement officers then went to the defendant's home, where his wife gave permission to seize the home computer. On that computer, investigators found additional child pornography. (*Id.* at pp. 955-956.) The defendant was indicted for possession of child pornography and pled guilty after unsuccessfully moving to suppress the evidence seized during the searches of his work and home computers. (*Id.* at p. 956.)

As relevant here, the Eighth Circuit held that the warrantless search of the defendant's home computer did not violate the Fourth Amendment. It explained as follows: "The legal issue of whether an officer's knowledge of the prior express refusal by one co-tenant negates the later obtained consent of another authorized co-tenant is a matter of first impression in this court. We will answer this compound legal question by answering the separate legal questions involved.

"First, we know Mrs. Hudspeth was a co-tenant authorized to give the officers consent to search. [Citation.] . . .

"Second, unlike *Randolph*, the officers in the present case were not confronted with a 'social custom' dilemma, where two physically present co-tenants have contemporaneous competing interests and one consents to a search, while the other objects. Instead, when Cpl. Nash asked for Mrs. Hudspeth's consent, Hudspeth was not present because he had been lawfully arrested and jailed based on evidence obtained wholly apart from the evidence sought on the home computer. Thus, this rationale for the

narrow holding of *Randolph*, which repeatedly referenced the defendant's physical presence *and* immediate objection, is inapplicable here.

". . . . . .

"The *Randolph* opinion repeatedly referred to an 'express refusal of consent by a *physically present* resident.' *Randolph*, 547 U.S. at 120, 126 S.Ct. 1515 (emphasis added); *e.g.*, *id.* at 108, 109, 114, 121-23, 126 S.Ct. 1515. The *Randolph* majority candidly admitted 'we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact *at the door and objects*, the co-tenant's permission does not suffice for a reasonable search.' *Id.* at 121, 126 S.Ct. 1515 (emphasis added). Hudspeth was not at the door and objecting and does not fall within *Randolph's* 'fine line.' . . .

"The Fourth Amendment does not prohibit warrantless searches and seizures, nor does the Fourth Amendment always prohibit warrantless searches and seizures when the defendant previously objected to the search and seizure. 'What [Hudspeth] is assured by the Fourth Amendment itself, however, is . . . no such search will occur that is "unreasonable."' *Rodriguez*, 497 U.S. at 183, 110 S.Ct. 2793. As the Supreme Court explains, 'it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his [or her] own right.' *Matlock*, 415 U.S. at 171 n. 7, 94 S.Ct. 988. And the absent, expressly objecting co-inhabitant has 'assumed the risk' that another co-inhabitant 'might permit the common area to be searched.' *Id.* The authorized co-tenant may give consent for several reasons including an unawareness of contraband on the premises, or a desire to protect oneself or others (as here, Mrs. Hudspeth, in the self-interest of herself and her children, consented to the seizure of the home computer to prevent the placement of an armed, uniformed law enforcement officer in her home to guard the evidence while a search warrant was obtained).

"Under the totality of circumstances of the present case, maintaining the Fourth Amendment's touchstone requirement against unreasonable searches and seizures, we conclude the seizure of Hudspeth's home computer was reasonable and the Fourth Amendment was not violated when the officers sought Mrs. Hudspeth's consent despite having received Hudspeth's previous refusal. We affirm the district court's denial of

Hudspeth's motion to suppress the evidence obtained from the warrantless seizure of Hudspeth's home computer." (*Hudspeth, supra*, 518 F.3d at pp. 960-961.)

The Seventh Circuit followed *Hudspeth* (and declined to follow *Murphy*) in *United States v. Henderson* (7th Cir. 2008) 536 F.3d 776 (*Henderson*). There, police were called to the home of the defendant and his wife, Patricia, to investigate a report of domestic abuse. Patricia admitted police into the home, where in "unequivocal terms" the defendant ordered them out.[8] (*Id.* at p. 777.) The officers arrested the defendant for domestic battery and took him to jail. After his arrest and removal from the scene, Patricia signed a consent-to-search form and led the police on a search that uncovered firearms, crack cocaine, and items indicative of drug dealing. The defendant was indicted on federal weapon and drug charges.

The defendant moved to suppress the evidence recovered from his home, arguing that the search was unreasonable under the Fourth Amendment based on the Supreme Court's decision in *Randolph.* (*Henderson, supra*, 536 F.3d at p. 777.) The Seventh Circuit disagreed: "Henderson argues that his objection remained in force to override Patricia's subsequent consent. He, like the Ninth Circuit, interprets *Randolph* as not confined to its circumstances, that is, as *not* limited to a disputed consent by two contemporaneously present residents with authority. On this broader reading of *Randolph*, a one-time objection by one is sufficient to permanently disable the other from *ever* validly consenting to a search of their shared premises. We think this extends *Randolph* too far. *Randolph* itself, we observed in [*United States v.*] *Groves*, [530 F.3d 506 (7th Cir. 2008)], 'expressly disinvites' any reading broader than its specific facts.

"Like the Eighth Circuit, we see the contemporaneous presence of the objecting and consenting cotenants as indispensable to the decision in *Randolph*. Indeed, the fact of a conflict between present co-occupants plays a vital role in the *Randolph* majority's 'social expectations' premise; a third party, attuned to societal customs regarding shared

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[8] According to the court: "After a brief exchange, Henderson told the officers to '[g]et the [expletive] out of my house'—which the district court reasonably construed as an objection to a search." (*Henderson, supra*, 536 F.3d at pp. 777-778.)

premises, would not, '[w]ithout some very good reason,' enter when faced with a disputed invitation between cotenants. *Randolph*, 547 U.S. at 113, 126 S.Ct. 1515. The calculus shifts, however, when the tenant seeking to deny entry is no longer present. His objection loses its force because he is not there to enforce it, or perhaps (if we understand the Court's rationale correctly) because the affront to his authority to assert or waive his privacy interest is no longer an issue. As between two present but disagreeing residents with authority, the tie goes to the objector; police may not search based on the consent of one in the face of 'a physically present inhabitant's express refusal of consent' to search. *Id.* at 122, 126 S.Ct. 1515. We do not read *Randolph* as vesting the objector with an absolute veto; nothing in the majority opinion suggests the Court was creating a rule of continuing objection." (*Henderson, supra*, 536 F.3d at pp. 783-784.)

"Neither the Eighth nor the Ninth Circuit considered the limiting effect of Justice Breyer's concurrence on the scope of the majority opinion. As we have noted, Justice Breyer joined the other four members of the majority with the understanding that the Court's opinion was 'case specific' and 'does not apply where the objector is not present and objecting.' *Id.* at 126-27, 126 S.Ct. 1515 (Breyer, J., concurring) (internal quotation marks omitted). That, and the specific limiting language in the majority opinion itself, convince us that *Randolph's* holding ought not be extended beyond the circumstances at issue there. *See id.* at 106, 126 S.Ct. 1515 ('We hold that, *in the circumstances here at issue*, a *physically present* co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.') (emphasis added).

"The Ninth Circuit's decision in *Murphy* essentially reads the presence requirement out of *Randolph*, expanding its holding beyond its express terms and giving rise to many questions with no readily identifiable principles to turn to for answers. If an objecting co-occupant's presence is not required, are there any limits to the superiority or duration of his objection? What circumstances (if any) operate to reinstate a co-occupant's authority to consent to a search? May an occupant arrested or interviewed away from the home preemptively object to a police request to search and effectively disable his co-occupants from consenting even in his absence? *Murphy's* answer—that

the objecting occupant's objection is binding until he, and only he, objectively manifests his consent to a search—ignores *Randolph's* social-expectations foundation. A prior objection by an occupant who is no longer present would not be enough to deter a sensible third party from accepting an invitation to enter by a co-occupant who is present with authority to extend the invitation. Under these circumstances even an initially reluctant guest would feel confident he was not breaking any unwritten social rules by entering. Just as a tenant's mere presence is not enough to override his cotenant's consent, *see Rodriguez*, 497 U.S. at 177, 110 S.Ct. 2793 (tenant asleep in the next room), so too his objection is not enough if he is absent from the later entry by authorities with the voluntary consent of his cotenant.

". . . . . .

"Our conclusion, like the Eighth Circuit's, implements *Randolph's* limiting language and the Court's stated intent to maintain the vitality of *Matlock* and *Rodriguez*. Absent exigent circumstances, a warrantless search of a home based on a cotenant's consent is unreasonable in the face of a present tenant's express objection. Once the tenant leaves, however, social expectations shift, and the tenant assumes the risk that a cotenant may allow the police to enter even knowing that the tenant would object or continue to object if present. Both presence *and* objection by the tenant are required to render a consent search unreasonable as to him.

"Here, it is undisputed that Henderson objected to the presence of the police in his home. Once he was validly arrested for domestic battery and taken to jail, however, his objection lost its force, and Patricia was free to authorize a search of the home. This she readily did. Patricia's consent rendered the warrantless search reasonable under the Fourth Amendment, and the evidence need not have been suppressed. (Fn. omitted.)" (*Henderson, supra*, 536 F.3d at pp. 784-785.)

At least two other federal circuit courts and two state Supreme Courts have followed *Hudspeth* and *Henderson* and declined to follow *Murphy*. (See *United States v. Shrader* (4th Cir. 2012) 675 F.3d 300, 307; *United States v. Cooke* (5th Cir. 2012) 674

F.3d 491, 499; *People v. Strimple* (Colo. 2012) 267 P.3d 1219, 1221-1226; *State v. St. Martin* (Wis. 2011) 334 Wis.2d 290, 306-310.)

D. Analysis

We conclude that *Randolph* does not require exclusion of the evidence obtained in the warrantless search of defendant's home. We begin by noting that, like the federal appellate cases discussed above, the facts here differ in a critical way from those of *Randolph*. While the defendant in *Randolph* was present and continued to object to a search of his home, in the present case defendant had been arrested and removed from the apartment before Rojas consented to a search. Thus, unlike in *Randolph*, there was in this case no co-tenant "*who is present* and states a refusal to permit the search." (*Randolph*, *supra*, 547 U.S. at p. 108, italics added.)

Defendant's absence from the home when Rojas consented to a search of the apartment is, we believe, determinative. *Randolph* did not overturn prior cases holding that a co-inhabitant may give effective consent to search a shared residence; to the contrary, the *Randolph* court explicitly affirmed the vitality of those cases. (*Randolph*, *supra*, 547 U.S. at p. 121.) It did so, moreover, even though it noted that the defendants in both *Matlock* and *Rodriguez* were nearby when each cotenant's consent was secured—indeed, the *Rodriguez* defendant was asleep inside the apartment—and thus could have been asked to consent as well. In other words, the *Randolph* court distinguished between cases in which a defendant *was present and objected* to a search, on the one hand, and cases in which a defendant was *not present* and therefore could not object to a search, on the other. The court recognized that it was "drawing a fine line," but believed its formalism was justified so long as there was no evidence that police had removed a potentially objecting tenant from the scene for the sake of avoiding a possible objection. (*Ibid.*)

We believe that the line we draw is consistent with that drawn by the Supreme Court in *Randolph*. As in *Randolph*, the line we draw is a clear one, distinguishing between cases in which a defendant is present and objecting to a search, and those in

which a defendant has been lawfully arrested and thus is no longer present when a cotenant consents to a search of a shared residence. It thus preserves the "simple clarity of complementary rules" established by *Randolph*. (*Randolph*, *supra*, 547 U.S. at p. 121.)

Further, our rule preserves the law enforcement prerogatives recognized by *Randolph*. As we have said, *Randolph* expressly reaffirmed the holdings of *Matlock* and *Rodriguez*, noting that "it would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if we were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received." (*Randolph*, *supra*, 547 U.S. at p. 122.) We believe that requiring officers who have already secured the consent of a defendant's cotenant to also secure the consent of an absent defendant would similarly and needlessly limit the capacity of law enforcement to respond to "ostensibly legitimate opportunities in the field." (*Ibid.*)

We note, as the Seventh Circuit did in *Henderson*, that the rule advocated by defendant and adopted by the Ninth Circuit in *Murphy* permits "a one-time objection" by one cotenant to "permanently disable the other [co-tenant] from *ever* validly consenting to a search of their shared premises." (*Henderson*, *supra*, 536 F.3d at p. 783.) Like *Henderson*, we think such a rule "extends *Randolph* too far." (*Ibid.*)

Finally, like the Fourth, Fifth, Seventh, and Eighth Circuits, we believe that the defendant's presence was indispensible to the decision in *Randolph*. We again quote *Henderson*, which well articulated the analysis: "[T]he fact of a conflict between present co-occupants plays a vital role in the *Randolph* majority's 'social expectations' premise; a third party, attuned to societal customs regarding shared premises, would not, '[w]ithout some very good reason,' enter when faced with a disputed invitation between cotenants. *Randolph*, 547 U.S. at 113, 126 S.Ct. 1515. The calculus shifts, however, when the tenant seeking to deny entry is no longer present. His objection loses its force because he is not there to enforce it[.]" (*Henderson*, *supra*, 536 F.3d at pp. 783-784.)

For all of these reasons, we conclude that Rojas's consent to a search of the apartment she shared with defendant was valid, and thus the trial court did not err in denying defendant's motion to exclude.

II. The Trial Court Did Not Err When It Admitted Evidence of a Prior Arrest in Defendant's Apartment

Defendant contends that the trial court abused its discretion by admitting evidence that an attempted murder suspect was arrested in his apartment. He urges that the evidence was substantially more prejudicial than probative, and there is a reasonable probability that the outcome would have been more favorable to him if the evidence had been excluded. For the following reasons, we disagree.

A. Facts

Officer Cirrito testified that on September 12, 2009, one month before the arrest in the present case, Drifters members Michael Rocco and Samuel Cruz were arrested for attempted murder. They were convicted on August 27, 2010. Rocco was arrested in defendant's living room; Rojas, with defendant behind her, opened the apartment door to the officers who arrested Rocco. Cruz was arrested in the crawl space under defendant's apartment building.

Defendant moved to exclude evidence of the arrest under Evidence Code section 352, contending that the evidence was unduly prejudicial because "[t]he risk of guilt by association is obviously extreme." The prosecutor disagreed, noting that Rojas denied defendant was an active gang member, and "This is very fresh. This is something that happened a month before the incident in this case, which would corroborate the fact that he is an active gang member that's benefiting the gang. He's hiding out gang members in his apartment to avoid getting arrested."

The court denied the motion to exclude, explaining as follows: "The People have to prove that the crime was committed for the benefit of, at the direction or in association with a criminal street gang. So to some extent, the law permits guilt by association as

proof because they don't have to show that Mr. Fernandez was an active gang member at the time, only if it was one of those three things now, that may be evidence of one of those three things, but that's not. It's true it is somewhat prejudicial to the defendant, but I don't think unduly so, and that's the statutory basis, and I think it is highly probative and also to impeach Ms. Rojas. So after weighing it under 352, I find that the probative value does outweigh any undue prejudice to the defendant, and I'm going to allow that."

B. Analysis

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "'Evidence is substantially more prejudicial than probative . . . [only] if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [citation].' (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)" (*People v. Tran* (2011) 51 Cal.4th 1040, 1047 (*Tran*).) A trial court's ruling on the admission of evidence is reviewed for abuse of discretion. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

The evidence challenged here was admitted to prove that defendant was an active participant in a criminal street gang as defined by the California Street Terrorism Enforcement and Prevention Act (the STEP Act; § 186.20 et seq.). The STEP Act criminalizes active participation in a criminal street gang (§ 186.22, subd. (a)), defined as any ongoing association that has as one of its primary activities the commission of certain criminal offenses and engages through its members in a "pattern of criminal gang activity." (§ 186.22, subd. (f); see *Tran, supra*, 51 Cal.4th at p. 1044.) A pattern of criminal gang activity is "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" specified criminal offenses within a certain time frame, on separate occasions, or by two or more persons (the "predicate offenses"). (§ 186.22, subd. (e); see *Tran, supra*, at p. 1044.)

In *People v. Tran, supra*, 51 Cal.4th 1040, the California Supreme Court considered whether a predicate offense may be established by evidence of an offense committed by the defendant on a separate occasion. Although the court acknowledged that such evidence is "[w]ithout doubt . . . inherently prejudicial" (*id.* at p. 1047), it held that a predicate offense may be established by such evidence. It explained: "[B]ecause the prosecution is required to establish the defendant was an active participant in a criminal street gang and had knowledge of the gang's criminal activities, the jury inevitably and necessarily will in any event receive evidence tending to show the defendant actively supported the street gang's criminal activities. That the defendant was personally involved in some of those activities typically will not so increase the prejudicial nature of the evidence as to unfairly bias the jury against the defendant. In short, the use of evidence of a defendant's separate offense to prove a predicate offense should not generally create 'an intolerable "risk to the fairness of the proceedings or the reliability of the outcome."' (*People v. Waidla, supra*, 22 Cal.4th at p. 724.)" (*Tran, supra*, at p. 1048.)

The *Tran* court rejected the defendant's contention that evidence of a defendant's separate offense on another occasion should not be admitted when the prosecution has the ability to develop evidence of offenses committed on separate occasions by other gang members. "[D]efendant cites no authority for the argument that the prosecution must forgo the use of relevant, persuasive evidence to prove an element of a crime because the element might also be established through other evidence. The prejudicial effect of evidence defendant committed a separate offense may, of course, outweigh its probative value if it is merely cumulative regarding an issue not reasonably subject to dispute. [Citations.] But the prosecution cannot be compelled to '"present its case in the sanitized fashion suggested by the defense."' [Citation.] When the evidence has probative value, and the potential for prejudice resulting from its admission is within tolerable limits, it is not *unduly* prejudicial and its admission is not an abuse of discretion. Further, a rule requiring exclusion of evidence of a defendant's separate offense on the theory the prosecution might be able to produce evidence of offenses committed by other gang

members would unreasonably favor defendants belonging to large gangs with a substantial history of criminality. That the prosecution might be able to develop evidence of predicate offenses committed by other gang members therefore does not require exclusion of evidence of a defendant's own separate offense to show a pattern of criminal gang activity. [Fn. omitted.]" (*Tran, supra*, 51 Cal.4th at pp. 1048-1049.)

In the present case, evidence of Rocco's arrest in defendant's living room was not unduly prejudicial; indeed it was substantially less so than the evidence admitted in *Tran* that the defendant *himself* had committed a prior offense for the benefit of a criminal street gang. Moreover, the evidence of Rocco's arrest in defendant's apartment was relevant to prove both that defendant was an active member of the Drifters (a fact that defendant and Rojas denied) and that the Drifters are a criminal street gang within the meaning of the statute. The trial court did not err in admitting the evidence.

III. Sufficiency of the Evidence to Support the Gang Enhancement

Defendant urges there is no evidence that he committed the robbery of which he was convicted with the "specific intent to promote, further, or assist in any criminal conduct by gang members," as section 186.22, subdivision (b)(1)(C) requires. For the following reasons, we disagree.

In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.) We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. (*Ibid.*) If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding; "'[a] reviewing court neither reweighs evidence nor reevaluates a witness's credibility.'" (*Ibid.*)

California law is clear that the commission of a crime "'in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime.' (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322; see also *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 ['very fact that defendant committed the charged crimes in association with fellow gang members' supports the enhancement].)" (*People v. Miranda* (2011) 192 Cal.App.4th 398, 412; see also *People v. Romero* (2006) 140 Cal.App.4th 15, 19-20 ["Thus, the specific intent element is satisfied if appellant had the specific intent to 'promote, further, or assist' Moreno in the shootings of Dennard and King. There was ample evidence that appellant intended to commit a crime, that he intended to help Moreno commit a crime, and that he knew Moreno was a member of his gang. This evidence creates a reasonable inference that appellant possessed the specific intent to further Moreno's criminal conduct."].)

Defendant contends that because his associates were never identified, there is no evidence he acted in concert with other gang members. We do not agree. There was extensive evidence that defendant was a member of the Drifters, including defendant's admission that he had been a member of the Drifters, the gang paraphernalia in his home, defendant's Drifters tattoos, and his residence in a Drifters stronghold. Further, there was evidence that (1) defendant immediately identified himself as a Drifters member when he approached Lopez; (2) defendant then whistled for three or four other men, who assisted defendant in attacking Lopez; and (3) the other men emerged from, and then retreated to, a building on 14th Street and Magnolia, which Cirrito identified as a Drifters stronghold. Although defendant theoretically could have planned a street crime with individuals who were not members of his gang, if he had done so it is extremely unlikely that he would have identified the Drifters immediately before committing the crime or made use of a Drifters stronghold immediately afterwards. Thus, although the other men who helped defendant rob Lopez were not identified, the evidence was sufficient to permit the jury to infer that defendant's confederates were fellow gang members.

Further, even without evidence that defendant robbed Lopez in concert with other Drifters members, the evidence still would have been sufficient to support the jury's finding that defendant had the specific intent to further criminal conduct by Drifters members. Cirrito testified that a gang benefits when members openly commit crimes within the gang's territory because "[t]hey put fear in the neighborhood. People are afraid to come forth and talk about the crimes." Based on this testimony, the jury properly could infer that defendant intended to benefit the Drifters and its members in precisely this manner when he robbed Lopez in the middle of the day on a well-traveled street. The inference is strengthened by the fact that defendant identified himself as a member of the Drifters immediately before robbing Lopez; indeed, it is difficult to imagine that defendant would have identified himself as a Drifters member for any reason *other than* to benefit the gang and the criminal conduct of its members. (See *In re Cesar V.* (2011) 192 Cal.App.4th 989, 1000 ["There was no reason for Cesar and Antonio to make a gang challenge except to promote further criminal activity by Poor Side Chicos gang members."]; *People v. Margarejo* (2008) 162 Cal.App.4th 102, 109-110 (*Margarejo*) ["It is remarkable for a person in a high-speed chase to make gang signs to pedestrians and *to the police*. Why bother with this effort to communicate? It cannot aid the ordinary goal of an attempted escape, which is to escape. Without objection, an officer testified Margarejo's signing was to 'intimidate the community, intimidate us.'"].)

Although we "cannot look into people's minds directly to see their purposes," we "can discover mental state . . . from how people act and what they say." (*Margarejo*, *supra*, 162 Cal.App.4th at p. 110.) Here, defendant "acted like he wanted to help his gang": He repeatedly announced his gang's dominance while committing a violent crime in broad daylight. (*Ibid.*) As in *Margarejo*, "[t]he message he broadcast—the *only* message he broadcast—was the gang message. The logical purpose was to accomplish the foreseeable effect: to proclaim the gang's dominance[.]" (*Ibid.*) Thus, the jury could reasonably conclude defendant had "the specific intent to . . . assist [other] criminal conduct by gang members." (§ 186.22, subd. (b)(1).)

IV. *Pitchess* Motion

Defendant contends that the trial court erred by denying his motion for discovery under *Pitchess*, *supra*, 11 Cal.3d 531. He contends that the motion clearly articulated the grounds on which the discovery was being sought and set forth a logical connection between the proposed defense and charges, as required by Evidence Code section 1043. For the following reasons, we agree in part.

A. Facts

Officer Cirrito filed a police report following defendant's arrest. As relevant to the *Pitchess* motion, it stated that on October 12, 2009, Officers Corona, Clark, and Cirrito conducted a domestic violence investigation at 2223 West 15th St. They were met at the door by "Roxann R." (Roxanne Rojas), who stated she was in the house with her children. She had redness and swelling on the bridge of her nose and forehead, and blood smeared on her shirt and right wrist. Cirrito questioned her about her injuries and she "replied [that] she got into a fight." Cirrito interviewed Rojas again after defendant was arrested and removed from the scene. According to the police report, she told Cirrito as follows: "Roxann R. stated she was upset at [defendant] because she observed him talking to another girl, Vanessa, earlier. Roxann R[.] stated she got into a confrontation with Vanessa and was very upset. Roxann R. confronted [defendant] in the apartment. Both [defendant] and Roxann R. got into a verbal confrontation over the other girl, Vanessa. [Defendant] became enraged and struck Roxann R. on the face causing swelling and bruising to her nose, forehead, left eye and left temple area. Roxann R. stated [defendant] struck her once and then walked away into another room." According to the police report, Detective Clark also interviewed Rojas's son, Christian, who said that defendant "hit his mom and made her cry and bleed."

Defendant filed a motion for pretrial discovery. The motion sought evidence of "[a]ll complaints from any and all sources relating to acts of violation of constitutional rights, fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probable cause, illegal search/seizure[,] false arrest, perjury, dishonesty, writing of

false police reports, writing of false police reports to cover up the use of excessive force, planting of evidence, false or misleading internal reports including but not limited to false overtime or medical reports, and any other evidence of misconduct amounting to moral turpitude within the meaning of *People v. Wheeler* (1992) 4 Cal.4th 284" against Officers Clark, Cirrito, and Corona. In support, defense counsel declared that according to police reports, "Roxann R." (Roxanne Rojas) told officers that defendant had struck her in the face, but "[b]ased upon information and belief, Roxann R. never told the officers that she had been struck by [defendant]. Rather, after they came to her door and knocked for her to open the door, she told them repeatedly that her injuries had been caused by a fight she had gotten into earlier that morning with a girl named Vanessa. She got into a confrontation with Vanessa at the apartment complex and entered into a physical fight with her. She was then arguing verbally with [defendant] about his relationship with Vanessa before the officers came to the door, but no blows were exchanged between her and [defendant] at any time."

The court denied the *Pitchess* motion, stating that it did not believe it plausible that officers lied about what Rojas told them because "[defendant's] son also said that [defendant] struck his mother, and that's in the police reports."

B. Analysis

In *Pitchess, supra*, 11 Cal.3d 531, the California Supreme Court held that a criminal defendant may in some circumstances compel the discovery of evidence in a law enforcement officer's personnel file. In 1978, the California Legislature codified the procedures surrounding so-called "*Pitchess* motions" through the enactment of sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045. (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 69 (*Garcia*).) A trial court has broad discretion in ruling on a *Pitchess* motion, and we review the court's decision for abuse of discretion. (*Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1086; *People v. Hughes* (2002) 27 Cal.4th 287, 329.)

To obtain *Pitchess* information, the defendant must file a written motion. (Evid. Code, § 1043, subd. (a).) The motion "must describe 'the type of records or information sought' and include '[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.' [Fn. omitted.] (§ 1043, subd. (b)(2), (3).)[9] This good cause showing is a 'relatively low threshold for discovery.' [Citation.] Assertions in the affidavits 'may be on information and belief and need not be based on personal knowledge [citation], but the information sought must be requested with sufficient specificity to preclude the possibility of a defendant's simply casting about for any helpful information.' [Citation.] If the defendant establishes good cause, the court must review the records in camera to determine what, if any, information should be disclosed. (*Ibid.*; § 1045, subd. (b).)" (*Garcia, supra*, 42 Cal.4th at pp. 70-71.)

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[9] Evidence Code section 1043 provides: "(a) In any case in which discovery or disclosure is sought of peace or custodial officer personnel records or records maintained pursuant to Section 832.5 of the Penal Code or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records. The written notice shall be given at the times prescribed by subdivision (b) of Section 1005 of the Code of Civil Procedure. Upon receipt of the notice the governmental agency served shall immediately notify the individual whose records are sought.

"(b) The motion shall include all of the following:

"(1) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace or custodial officer whose records are sought, the governmental agency which has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard.

"(2) A description of the type of records or information sought.

"(3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.

"(c) No hearing upon a motion for discovery or disclosure shall be held without full compliance with the notice provisions of this section except upon a showing by the moving party of good cause for noncompliance, or upon a waiver of the hearing by the governmental agency identified as having the records."

In *Warrick v. Superior Court* (2005) 35 Cal.4th 1011 (*Warrick*), our Supreme Court described the necessary evidentiary support for a *Pitchess* motion as follows: "The supporting affidavit 'must propose a defense or defenses to the pending charges.' (*Id.* at p. 1024.) To show the requested information is material, a defendant is required to 'establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events.' (*Id.* at p. 1021.) The information sought must be described with some specificity to ensure that the defendant's request is 'limited to instances of officer misconduct related to the misconduct asserted by the defendant.' (*Ibid.*)

"Counsel's affidavit must also describe a factual scenario that would support a defense claim of officer misconduct. (*Warrick, supra*, 35 Cal.4th at pp. 1024-1025.) 'That factual scenario, depending on the circumstances of the case, may consist of a denial of the facts asserted in the police report.' (*Ibid.*) 'In other cases, the trial court hearing a *Pitchess* motion will have before it defense counsel's affidavit, and in addition a police report, witness statements, or other pertinent documents. The court then determines whether defendant's averments, "[v]iewed in conjunction with the police reports" and any other documents, suffice to "establish a plausible factual foundation" for the alleged officer misconduct and to "articulate a valid theory as to how the information sought might be admissible" at trial.' (*Id.* at p. 1025.) Corroboration of or motivation for alleged officer misconduct is not required. (*Ibid.*) Rather, 'a plausible scenario of officer misconduct is one that might or could have occurred.' (*Id.* at p. 1026.) A scenario is plausible when it asserts specific misconduct that is both internally consistent and supports the proposed defense. (*Ibid.*) 'A defendant must also show how the information sought could lead to or be evidence potentially admissible at trial.' (*Ibid.*) A defendant who meets this burden has demonstrated the materiality requirement of section 1043. (*Warrick*, at p. 1026.)" (*Garcia, supra*, 42 Cal.4th at p. 71.)

In the present case, there is a logical link between the crime charged (corporal injury to a spouse, cohabitant, or child's parent) and the proposed defense. The police

report authored by Officer Cirrito says that immediately after the officers arrested defendant, Rojas told Cirrito that defendant hit her in the face. According to defense counsel's declaration, however, Rojas never told the officers that defendant hit her; instead, she said repeatedly that her injuries resulted from a fight she had gotten into earlier that morning with Vanessa. Rojas's statement to the police about who caused her injury plainly is relevant, and any evidence that Cirrito previously had falsified a police report would tend to undermine Cirrito's testimony that Rojas initially blamed defendant for her injuries. Consequently, counsel's declaration was sufficient to require the trial court to conduct an in camera review of Cirrito's personnel file. The declaration was *not* sufficient to require the trial court to conduct an in camera review of the personnel files of Clark and Corona, however, as neither officer authored the police report or was the apparent source of any statements in Cirrito's report about who Rojas blamed for her injuries.

The Attorney General contends that the trial court was within its discretion in finding that the allegation that Cirrito fabricated Rojas's statements was "implausible" in light of what Rojas's son indisputably told the police. We do not agree. The *Pitchess* threshold is "relatively low": A defendant must show a scenario of officer misconduct "might" or "could have" occurred, but need not show that such a scenario is "credible" or "believable." (*Warrick, supra*, 35 Cal.4th at p. 1026.) As the Supreme Court explained in *Warrick*, to require a criminal defendant to present a "credible" or "believable" factual account of police misconduct "suggests that the trial court's task in assessing a *Pitchess* motion is to weigh or assess the evidence. It is not. . . . The trial court does not determine whether a defendant's version of events, with or without corroborating collateral evidence, is persuasive—a task that in many cases would be tantamount to determining whether the defendant is probably innocent or probably guilty." (*Ibid.*) The trial court therefore erred in failing to conduct an in camera review of Officer Cirrito's personnel files based on the asserted "implausibility" of counsel's representation.

The remedy for a failure to conduct an in camera review of an officer's personnel records was established by the Supreme Court in *People v. Gaines* (2009) 46 Cal.4th 172

(*Gaines*). There, the court said that the proper remedy when a trial court has erroneously rejected a showing of good cause for *Pitchess* discovery and has not reviewed the requested records in camera "is not outright reversal, but a conditional reversal with directions to review the requested documents in chambers on remand." (*Id.* at p. 180.) After reviewing the confidential materials in chambers, the trial court may determine that the requested personnel records contain no relevant information; if so, it should reinstate the judgment. If the trial court determines on remand that relevant information exists and should be disclosed, the trial court "'must order disclosure, allow [defendant] an opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed.'" (*Id.* at p. 181.)

In the present case, we conditionally reverse only count 2 (corporal injury on a spouse, cohabitant, or child's parent), because that is the sole count to which the declaration submitted in support of the *Pitchess* motion is relevant. On remand, the trial court shall review the relevant portions of Officer Cirrito's personnel records in chambers. If it determines after doing so that the records contain no relevant information, it shall reinstate the judgment as to count 2. (*Gaines*, *supra*, 46 Cal.4th at p. 181.) If the court's review reveals relevant information, it shall disclose that information to defendant and give him a reasonable opportunity to investigate. The court shall order a new trial only if defendant demonstrates a reasonable probability of a different outcome had the evidence been disclosed; if not, it shall reinstate the judgment. (*Ibid.*)

DISPOSITION

The conviction on count 2, willful infliction of corporal injury on a spouse, cohabitant, or child's parent, is conditionally reversed, with directions to the trial court to review relevant portions of Officer Cirrito's personnel records in chambers. If the trial court determines that the records contain no relevant information, it shall reinstate the judgment as to count 2. If it determines that the records contain some relevant

information, it shall give defendant a reasonable opportunity to investigate the disclosed material and order a new trial if he demonstrates a reasonable probability of a different outcome had the evidence been disclosed; otherwise, the court shall reinstate the judgment as to count 2. In all other respects, the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.

APPENDIX B

Court of Appeal, Second Appellate District, Division Four No. B232277

S205218

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

WALTER FERNANDEZ, Defendant and Appellant.

The petition for review is denied.

SUPREME COURT
FILED

OCT 31 2012

Frank A. McGuire Clerk

Deputy

CANTIL-SAKAUYE

Chief Justice

OPPOSITION BRIEF

ORIGINAL

RESPONSE REQUESTED

FILED
APR - 3 2013
OFFICE OF THE CLERK

No. 12-7822

In the Supreme Court of the United States

WALTER FERNANDEZ,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Georgia v. Randolph, 547 U.S. 103, 121 (2006), held that, under the Fourth Amendment's co-occupant consent rule, a physically present occupant's objection proscribes a warrantless entry, despite a co-occupant's contemporaneous consent to search. *Randolph*, however, recognized a complementary rule, whereby a potential objector, who is nearby but not part of the threshold colloquy, "loses out," unless the police had removed him for the purpose of avoiding an objection. *Id.*

The question presented is:

Whether petitioner's objection to police entry into his shared apartment proscribed a subsequent warrantless search based on his co-tenant's consent given after petitioner had been removed from the premises for domestic violence and then lawfully arrested for a prior robbery, where there was no showing that the arrest was a pretext for the search.

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OPINIONS BELOW

Contrary to the statement in the petition (Pet. i), the California Court of Appeal's opinion was certified for partial publication, and is reported at *People v. Fernandez*, 145 Cal.Rptr.3d 51 (Cal. Ct. App. 2012). (Pet., App. A.) The California Supreme Court denied petitioner's petition for review. (Pet., App. B.)

STATEMENT OF THE CASE

Petitioner's convictions comprised three sets of crimes—(1) the armed robbery of Abel Lopez; (2) the domestic abuse of his girlfriend, Roxanne Rojas; and (3) the illegal possession of a firearm and ammunition. On the early afternoon of October 12, 2009, petitioner approached Lopez on the street, issued a gang challenge and tried to stab Lopez. When Lopez resisted, petitioner called to some accomplices, who helped him to subdue and rob the unarmed victim. Petitioner fled into the nearby apartment he shared with Rojas, where pursuing police officers heard a verbal altercation. A bloodied Rojas opened the door for the investigating officers. Upon detaining petitioner, the officers discovered that he matched the robbery suspect's description. After Lopez identified petitioner as the robber, the police arrested him. With petitioner either in the squad car or en route to the police department, the police returned to the apartment, where they obtained Rojas's consent to search the residence—and discovered the illegal firearm and ammunition, among other items.

Before trial, petitioner brought a pretrial motion to suppress evidence seized during the warrantless search of his apartment following his arrest, seeking to

exclude various items including a 20–gauge shotgun and ammunition, and a knife. After the trial court denied the suppression motion, petitioner pleaded no contest to three counts of firearm and ammunition possession.

Following a trial on the remaining two counts, the jury found petitioner guilty of second degree robbery of Lopez with knife- and criminal-street-gang findings, and inflicting corporal injury on his cohabitant, Rojas. The trial court imposed a fourteen-year sentence.

A. The Suppression Motion Evidence

At 12:15 p.m. on October 12, 2009, Police Officer Joseph Cirrito received a radio call as to an assault with a deadly weapon at Venice Boulevard and Magnolia Avenue—the Lopez robbery. The officer and his partner, Detective Kelly Clark, drove to petitioner's apartment building, a known location for the Drifters gang, based on a report that one of the suspects had a Drifters tattoo. They parked in the alley behind the apartment building, within a quarter mile of the robbery site on Venice. Officer Cirrito saw a male wearing a light blue t-shirt run across the alley toward the apartment.

While Officer Cirrito waited to hear a response to his radio request for a description of the suspect's clothes, he heard loud yelling and screaming from the second floor of the apartment building. He and Detective Clark waited less than thirty minutes for backup support before walking up the apartment building's back staircase. Officer Cirrito knocked on the door of the unit from which he had heard the yelling—the same apartment that he had seen the male suspect run inside. A

woman in her twenties (Rojas) opened the door, holding an infant. Her forehead was swollen and her shirt and hand were smeared with fresh blood.

Officer Cirrito and Detective Corona, one of the backup officers, asked Rojas to step outside the apartment into the hallway. Officer Cirrito questioned her about the blood, the yelling and whether there was anyone else in the apartment. Officer Cirrito saw petitioner inside. He was sweaty, hostile-looking and wore only boxer shorts. Petitioner yelled, "Get out. I know my rights. You can't come in." From the way petitioner and Rojas looked, the officer believed a battery or domestic violence incident between them had just taken place. The officer decided it was important to separate them. He was also concerned there might be someone else in the apartment.

When petitioner refused to step outside the apartment, Officer Cirrito and Detective Corona took him out, handcuffed him and escorted him down the back stairwell to keep him apart from Rojas. As petitioner walked down the stairs, Officer Cirrito saw a tattoo on petitioner's head. It matched the description of the robbery suspect. After Officer Cirrito confirmed the suspect's description with the officers at the robbery scene, Lopez was driven to the alley behind the apartment building where he identified petitioner as the person who robbed him.

Officer Cirrito returned to the apartment and saw Rojas standing at the front door. She said she lived in the apartment with petitioner and her children. Detective Clark received Rojas's oral and written consent to search the apartment. Approximately an hour had passed since petitioner had been handcuffed and

escorted down the apartment stairwell. During the apartment search, the officers recovered clothing and a knife that might have been used in the robbery, along with a shotgun and ammunition.

For the defense, Rojas testified that she heard a knock at her door and opened it to find six or seven police officers outside. She denied anything was happening. The officers asked to enter, but before she could answer, they saw petitioner and pushed their way inside. The officers wrestled petitioner to the floor and some of them dragged him down the stairs, while others stayed inside. Detective Clark took her son aside and began questioning him without her permission. Officer Cirrito refused her request to be present with her son, and threatened to take her children away. She did not want to sign the consent form, but felt the officers "pretty much" pressured her into consenting to the search. The officers stayed inside the apartment for four to five hours, while they tried to convince her to say that petitioner hit her, despite her denial.

On rebuttal, Officer Cirrito testified that he initially asked Rojas who was inside the apartment. She did not mention petitioner, but said it was herself and her children. Officer Cirrito had Rojas step outside of the apartment because he believed a fight had just taken place inside, and he needed to search immediately to investigate whether the domestic violence suspect was inside. Also, he had seen the robbery suspect run to the apartment building, and thought he might be inside the unit. Officer Cirrito further explained that, while he was escorting petitioner out of the apartment, other officers were performing a "protective sweep" of the

kitchen and living room areas. One of those officers showed Officer Cirrito a folding stainless steel "butterfly knife" found during that sweep.[1]

With regard to the initial confrontation at the apartment door, Officer Cirrito stressed that he had encountered an ongoing domestic violence incident. He described his thought process as follows: He saw "a female with an infant" and "blood, swelling, the yelling, the possibility someone's in there. Is she just trying to blow me off, or is there somebody in there? Are there children? Is he holding a child hostage?" The officer did not know what was happening inside. When he saw petitioner approaching from the kitchen area, the officer became concerned for the safety of the other officers because petitioner was visibly angry.

Contrary to Rojas's testimony, Officer Cirrito explained that only two officers initially detained petitioner inside the apartment, and that he was never taken down onto the ground. Nor was petitioner pushed or dragged down the stairs. It was only after Lopez had identified petitioner as the robbery suspect that Officer Cirrito and Detective Clark returned to the apartment, where they received Rojas's written consent to search. Officer Cirrito never threatened Rojas to obtain her consent. At some point during the interview with Rojas, she told Officer

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[1] Although Lopez testified that the knife was consistent with the one respondent used during the robbery, there was conflicting testimony as to whether it was recovered in the initial protective sweep or in the subsequent consensual search. However, as Lopez had been stabbed in the wrist, the knife's recovery was hardly crucial to the prosecution's armed robbery case. It was only the firearm and ammunition possession convictions that depended on the consensual search.

Cirrito that petitioner struck her in the face after the two argued about a confrontation with another woman.

B. The Trial and Appellate Rulings

The trial court denied the suppression motion, finding the police acted reasonably in investigating a potential crime—domestic violence—when they knocked on the apartment door after hearing the sound of a serious verbal altercation. Their reasonable suspicions were confirmed when Rojas answered and the officers saw her injuries. When petitioner approached them in a hostile manner, the police not only had further cause to investigate the domestic violence incident, but they had a legitimate basis to detain petitioner briefly for officer safety reasons. As such, the initial detention and handcuffing of petitioner amounted to a valid investigatory stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). Upon Officer Cirrito's observation of petitioner's tattoo, which was consistent with that of the robbery suspect, there was cause to detain him further to conduct the field show-up. When the victim identified petitioner, it gave the officers reasonable cause to arrest him.

As to the apartment search, the trial court found co-occupant Rojas gave the officers her valid consent. Based on its observation of Rojas's demeanor and her repeated statements that she thought about consenting before she decided to sign the form, the court found she was not coerced, despite feeling some pressure. The trial court specifically found the officers did not conduct a protective search for weapons, but rather a proper, limited and reasonable preliminary search to

determine whether any other dangerous person was in the apartment for purposes of officer safety.

On appeal, petitioner contended the search of his apartment was unreasonable under the Fourth Amendment, based on the co-occupant consent rule in *Georgia v. Randolph*, 547 U.S. 103, 121, which held that the police may not make a warrantless entry of a home despite an occupant's consent to search where a physically present co-occupant objects to the search. The Court of Appeal rejected the claim, holding Rojas's consent to a search of the apartment she shared with petitioner was valid and justified the officers' actions. *People v. Fernandez*, 145 Cal. Rptr. 3d at 63-66.

The appellate court observed that *Randolph* barred a warrantless search only when co-occupants were both present and disagreed about whether to consent. Unlike the objecting occupant in *Randolph*, petitioner had been arrested and removed from the apartment before Rojas gave her consent. The court found petitioner's "absence from the home when Rojas consented to a search of the apartment" to be "determinative." *People v. Fernandez*, 145 Cal. Rptr. 3d at 65. In the absence of evidence that the police had removed petitioner from the scene to avoid a possible objection, the court "believe[d] that the line we draw is consistent with that drawn by the Supreme Court in *Randolph*," as it "distinguish[ed] between cases in which a defendant is present and objecting to a search, and those in which a defendant has been lawfully arrested and thus is no longer present when a cotenant consents to a search of a shared residence." *Id.* at 65-66. The court

noted its agreement with four federal circuits and two state supreme courts that had recognized this distinction, and its disagreement with one federal circuit that had not. *Id.* at 62-66.

Petitioner petitioned for review to the California Supreme Court, which summarily denied his petition.

REASONS WHY THE WRIT SHOULD BE DENIED

According to petitioner, certiorari should be granted to resolve a conflict in the federal and state courts as to the proper interpretation of this Court's co-occupant consent rule: Whether, under *Georgia v. Randolph*, 547 U.S. 103 (2006), one occupant's initial objection to a warrantless search made when physically present remains effective, such that it cannot be overridden by a co-occupant's subsequent consent given to law enforcement officers when the first occupant is no longer present to object. (Pet. 3-4.) In essence, petitioner argues for adoption of the general rule set forth by the Ninth Circuit in *United States v. Murphy*, 516 F.3d 1117, 1124 (9th Cir. 2008): "[W]hen a co-tenant objects to a search and another party with common authority subsequently gives consent to that search in the absence of the first co-tenant the search is invalid as to the objecting co-tenant."[2] (Pet. 5-6.)

1. The petition should be denied for several reasons. First, the conflict in

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[2] *See also Murphy*, 516 F.3d at 1125 ("Once a co-tenant has registered his objection, his refusal to grant consent remains effective barring some objective manifestation that he has changed his position and no longer objects.").

the state and federal courts is heavily lopsided against petitioner's position. *Murphy*'s reasoning has been correctly, and almost universally, rejected, with the great weight of authority interpreting *Randolph* in the same way as the California Court of Appeal. *Murphy* therefore stands as an outlier, and is likely to pass into desuetude. No federal circuit court has agreed with *Murphy*, while the Fourth, Fifth, Seventh and Eighth Circuits, along with the Colorado and Wisconsin Supreme Courts, have rejected it.[3] The only published authorities to endorse *Murphy* are an intermediate appellate court in Oregon and the District of Columbia Court of Appeals, along with federal district courts in the Northern District of California and the Eastern District of Michigan.[4] And, most of these decisions can be distinguished from, and harmonized with, the contrary line of authorities.

Moreover, the Ninth Circuit has read *Murphy* narrowly, casting doubt on the viability of the broad rule on which petitioner seeks to rely. In *United States v. Brown*, 563 F.3d 410 (9th Cir. 2009), the court placed *Murphy*'s statement that the police "'cannot arrest a co-tenant and then seek to ignore an objection he has

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[3] *United States v. Shrader*, 675 F.3d 300 (4th Cir. 2012); *United States v. Cooke*, 674 F.3d 491 (5th Cir. 2012); *United States v. Henderson*, 536 F.3d 776 (7th Cir. 2008); *United States v. Hudspeth*, 518 F.3d 954 (8th Cir. 2008); *People v. Fernandez*, 145 Cal. Rptr. 3d at 62-66; *People v. Strimple*, 267 P.3d 1219 (Colo. 2012); *State v. St. Martin*, 800 N.W.2d 858 (Wis. 2011).

[4] *State v. Caster*, 234 P.3d 1087, 1097 (Or. App. 2010); *Martin v. United States*, 952 A.2d 181, 188 (D.C. 2008); *Richardson v. City of Antioch*, 722 F. Supp. 2d 1133, 1140 (N.D. Cal. 2010); *United States v. Phillips*, No. 12-20245, 2013 WL 943522 (E.D. Mich. 2013).

already made'" in the context of *Randolph*'s bad-faith exception to valid co-occupant consent—that is, "a pretextual arrest made for the specific purpose of preventing the arrestee's subsequent objection to the search . . . ." *Brown*, *supra*, 563 F.3d at 417 (quoting *Murphy*, 516 F.3d at 1124-25, and referring to *Randolph*, 547 U.S. at 121-22). In *Brown*, as in petitioner's case, there was no evidence the arrest was motivated by any such pretext. *Id.* at 417 ("there is no evidence that Brown's arrest was motivated by any purpose other than removing from the streets of Spokane" a felon on an outstanding warrant). Thus, it is far from clear that petitioner would prevail even under the Ninth Circuit precedent on which he relies.

2. Second, to the extent a legitimate split of authority exists, this case does not present a proper vehicle for resolving it. In *Murphy*, prior to his arrest and his co-tenant's later consent, the defendant-occupant had objected to a direct request by the police to conduct a warrantless search. Here, in contrast, petitioner spontaneously volunteered his objection to police entry before the police said anything to him, much less requested his consent to search. Instead, the police were in the process of responding to an ongoing domestic violence dispute between the co-occupants. The *Randolph* court made it clear there could be no Fourth Amendment objection when the police enter a residence to protect a victim of domestic violence. *Randolph*, 547 U.S. at 118. Therefore, petitioner's attempt to keep the police from entering the premises during an ongoing domestic violence investigation puts his objection on a different footing from that of an occupant like

the one in *Murphy*, as it is not clear whether petitioner's objection will count as invoking the Fourth Amendment's warrant requirement as to a later search after his arrest for a robbery. It follows that the resolution of this case is unlikely to reach the issue posed by *Murphy* and the solid line of authority rejecting its reasoning.

I. THE CALIFORNIA COURT OF APPEAL CORRECTLY INTERPRETED *RANDOLPH*; ANY SPLIT OF AUTHORITIES IS LOPSIDED IN FAVOR OF THE CALIFORNIA COURT OF APPEAL'S OPINION

It is easy to see why the Ninth Circuit's broad statement in *Murphy*—that a defendant's refusal of consent, once given, remains effective in perpetuity against the consent of a co-occupant until personally revoked, despite the defendant's legitimate, intervening arrest—has garnered so little support: It cannot be squared with the clear rule set forth in *Randolph*, unless it is read in the narrow way suggested by the Ninth Circuit in *United States v. Brown*, 563 F.3d at 417. *Randolph*'s holding is straightforward: "[A] warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." *Randolph*, 547 U.S. at 120 (footnote omitted).

To forestall potential ambiguity and to preserve the viability of two prior Fourth Amendment holdings,[5] *Randolph* purposefully drew a "fine line,"

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[5] *United States v. Matlock*, 415 U.S. 164, 170 (1974), and *Illinois v. Rodriguez*,
(continued...)

emphasizing the need to be physically present at the time consent is sought in order to enforce the warrant requirement: "[I]f a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out." *Id.* at 121. Thus, a cohabitant who has no opportunity to make a contemporaneous objection at the residence's threshold because he or she is in a nearby squad car, *United States v. Matlock*, 415 U.S. 164, 170 (1974), or asleep inside the apartment, *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990), is subject to the consent of a co-occupant. *Randolph*, 547 U.S. at p. 121.

Recognizing the potential for abuse that its ruling might have, *Randolph* posited a bad-faith exception: A co-occupant's consent would not be effective in the face of "evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection." *Randolph*, 547 U.S. at 121. Subject to that exception, *Randolph* emphasized the "practical value in the simple clarity" of its "complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it." *Randolph*, 547 U.S. at 121-22. Therefore, an occupant who cannot voice an

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497 U.S. 177, 181 (1990).

objection because he or she, like petitioner, has been legitimately taken into police custody implicitly "loses out" under the first of *Randolph*'s complementary rules.

The leading federal appellate case applying *Randolph* to a co-occupant's consent given after the defendant's arrest is *United States v. Hudspeth*, 518 F.3d 954 (8th Cir. 2008) (en banc). There, the police found child pornography on the defendant's office computer. The defendant refused consent to search the personal computer at his home. After arresting the defendant, the police went to the residence where his wife gave consent to search. *Id.* at 955-56. The Eighth Circuit distinguished *Randolph*'s holding and found the consent valid, based primarily on the defendant's absence from the home at the time consent was given: "Hudspeth was not present because he had been lawfully arrested and jailed based on evidence obtained wholly apart from the evidence sought on the home computer. Thus, this rationale for the narrow holding of *Randolph*, which repeatedly referenced the defendant's physical presence *and* immediate objection, is inapplicable here." *Id.* at 960.

In *United States v. Shrader*, 675 F.3d 300 (4th Cir. 2012), the Fourth Circuit followed *Hudspeth* and rejected *Murphy*, in a matter in which the defendant's earlier pre-arrest refusal to consent was at the same premises where the co-occupant gave her subsequent consent: "Because Shrader was absent from the premises, and there was no evidence that he was arrested for the purpose of nullifying his refusal to consent to the search, his aunt's consent provided adequate permission for the police to search the house, notwithstanding his earlier

objection." *Id.* at 307; *see also id.* (declining "to adopt the more expansive view of the Ninth Circuit which permits a defendant's refusal to operate indefinitely, 'barring some objective manifestation that he has changed his position and no longer objects'") (quoting *Murphy*, 516 F.3d at 1125).

Similarly, in *United States v. Cooke*, 674 F.3d 491, 499 (5th Cir. 2012), the Fifth Circuit "agree[d] with the Seventh and Eighth Circuits that the objection of an absent cotenant does not vitiate the consent of a physically present cotenant under *Randolph*." In *Cooke*, the defendant, who was jailed in another county, refused to consent to the search of the residence he shared with his mother. The police, however, went to the residence, where they obtained his mother's consent. *Id.* at 493, 496. The Fifth Circuit reasoned that "*Randolph* self-consciously emphasized the importance of Randolph's presence by repeatedly noting it when declaring and reiterating the holding." *Cooke*, 674 F.3d at 499. Moreover, in rejecting the Ninth Circuit's interpretation of *Randolph*, the Fifth Circuit explained that "although it is a close question, social convention normally allows for a visitor to feel invited into a home when invited by a physically-present resident, even if an absent cotenant objects to it, rather than the visitor's assuming he is *verboten* forever until the objector consents." *Id.* (footnote omitted).

In *United States v. Henderson*, 536 F.3d 776 (7th Cir. 2008), the Seventh Circuit held that a co-occupant's consent was valid under *Randolph* in circumstances analogous to those in petitioner's case. There, police officers responded to a domestic abuse report at the home shared by the defendant, his

wife and their son. The wife, who was standing on the front lawn of the home, told the officers that her husband had choked her and thrown her out of the house. She "had noticeable red marks around her neck that substantiated her story." *Id.* at 777. The defendant's teenage son gave the officers a house key, and the wife told them the defendant "had weapons in the house and had a history of drug and gun arrests." *Id*

The officers used the key to enter the home, and found the defendant in the living room. "After a brief exchange, Henderson told the officers to '[g]et the [expletive] out of my house'—which the district court reasonably construed as an objection to a search." *Henderson*, 536 F.3d at 777-78. The defendant was arrested for domestic battery and taken to the police station. A few minutes after that, defendant's wife agreed to a search of the home and signed a consent form. *Id.* at 778.

The Seventh Circuit therefore was faced with the same question raised in the instant petition: "Does a refusal of consent by a 'present and objecting' resident remain effective to bar the voluntary consent of another resident with authority after the objector is arrested and is therefore no longer 'present and objecting'?" *Henderson*, 536 F.3d at 781. The *Henderson* court followed *Hudspeth*, and applied *Randolph* to answer the question in the negative, rejecting *Murphy*'s interpretation in the process.[6] *Id.* at 781-85. As the Seventh Circuit

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[6] *See also* United *States v. Reed*, 539 F.3d 595, 598-99 (7th Cir. 2008) (finding (continued...)

pointed out: "The Ninth Circuit's decision in *Murphy* essentially reads the presence requirement out of *Randolph*, expanding its holding beyond its express terms and giving rise to many questions with no readily identifiable principles to turn to for answers." *Id.* at 784.

Moreover, as the Seventh Circuit explained, Justice Breyer's concurring opinion in *Randolph* provided additional reasons for refusing to extend its narrow holding. *Henderson*, 536 F.3d at 776 (citing *Randolph*, 547 U.S. at 127 (Breyer, J., concurring)). Not only did Justice Breyer's separate opinion "emphasize[] the majority's acknowledgment that police may properly enter a home, despite a present occupant's objection, in order to protect a victim from an ongoing or imminent crime and in certain other exigent circumstances," but it "declared the outer limits of the Court's holding: 'The Court's opinion does not apply where the objector is not present and objecting.'" *Id.* (quoting *Randolph*, 547 U.S. at 126 (internal quotation marks omitted).

Finally, two state courts of last resort have construed *Randolph* in the same manner as the California Court of Appeal and the Fourth, Fifth, Seventh and Eighth Circuits. In *People v. Strimple*, 267 P.3d 1219 (Colo. 2012), the Colorado Supreme Court held that a warrantless search was permissible and consistent with

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(...continued)

valid co-occupant consent given after the police stopped defendant's vehicle and arrested him on a outstanding warrant, despite the defendant's refusal to consent to the search of his shared apartment).

Randolph in circumstances analogous to those in petitioner's case. There, the police responded to a report of domestic abuse by the defendant's common law wife. The defendant refused entry and threatened to kill the officers. After a stand-off, the defendant surrendered and was taken into custody. His wife then consented to have the police search the residence. *Strimple*, 267 P.3d at 1221-22.

The *Strimple* court held that the defendant's pre-arrest objection to entry did not override his wife's consent to search that resulted in the seizure of firearms, explosives and drugs. It followed the Seventh Circuit's reasoning in *Henderson* and rejected the Ninth Circuit's approach in *Murphy*, concluding that *Randolph*'s cautionary language concerning pretextual arrests made for the purpose of avoiding a co-occupant's objection (which it referred to as dicta), did not apply to "'an otherwise valid third-party consent search where the objecting tenant is removed from the home based on a *legitimate*, nonpretextual arrest.'" *Strimple*, 267 P.3d at 1226 (quoting *Henderson*, 536 F.3d at 783 n.5 (emphasis in *Henderson*)).

Similarly, in *State v. St. Martin*, 800 N.W.2d 858, 859-60 (Wis. 2011), *cert. denied*, ___ U.S. 1003, 132 S. Ct. 1003, 181 L. Ed. 2d 745 (2012), the Wisconsin Supreme Court held that the consent of the defendant's girlfriend was valid, despite the fact that he had refused to consent while inside a police vehicle parked nearby. The state high court emphasized that there was "no evidence that taking St. Martin into custody was a pretext to remove him from the premises so that police could search for the cocaine." 800 N.W.2d at 867.

The *St. Martin* court agreed with *Hudspeth* and *Henderson* "that the *Randolph* Court incorporated an express requirement of physical presence in its shared-dwelling consent rule." *St. Martin*, 800 N.W.2d at 868. Therefore, it held that "under the justified formalism of the rules set forth by the United States Supreme Court, St. Martin was 'nearby' and 'not invited to take part in the threshold colloquy,' and that he therefore does not fall within the rule stated in *Randolph* such that the search should have been barred and the evidence gained from it suppressed." *Id.*

In contrast, no other federal circuit court has endorsed *Murphy*. Indeed, as stated above, the Ninth Circuit itself has read the decision narrowly, such that the validity of its broad interpretation of *Randolph* has been rendered questionable.

In *United States v. Brown*, 563 F.3d at 416-18, the Ninth Circuit found a co-tenant's consent valid, despite having been given after the defendant had been arrested. Distinguishing *Murphy*, the Ninth Circuit explained that its prior statement that the police "'cannot arrest a co-tenant and then seek to ignore an objection he has already made,'" was made in reference to *Randolph*'s bad faith exception to a co-occupant's valid consent—"a pretextual arrest made for the specific purpose of preventing the arrestee's subsequent objection to the search . . . ." *Brown*, *supra*, 563 F.3d at 417 (quoting *Murphy*, 516 F.3d at 1124-25, and referring to *Randolph*, 547 U.S. at 121-22). It therefore appears that *Brown* reads *Murphy* as implicitly finding that by arresting the defendant after he refused to consent, taking him into custody, and then returning to two hours later to obtain

consent from the co-tenant, the arrest had been a pretext for preventing the defendant from insisting on a search warrant. *See Brown*, 563 F.3d at 417-18 (citing *Murphy*, 516 F.3d at 1124-25). That exception was found not to apply in *Brown* because the defendant did not make a pre-arrest objection and there was "no evidence that Brown's arrest was motivated by any purpose other than removing from the streets of Spokane a felon wanted on an outstanding warrant for second degree assault and reportedly in possession of firearms." *Id.* at 417.

Indeed, construing *Randolph* in a manner consistent with the Fourth, Fifth, Seventh and Eighth Circuits, the *Brown* court found "[t]he fact that the police had an additional opportunity obtain Brown's consent, does not alter the fact that Brown was justifiably absent from the search colloquy." *Brown*, 563 F.3d at 417-18. "Moreover, in light of the policy justifications provided in *Randolph* for the 'fine line' drawn therein, Agent Watson's decision not to seek consent from Brown does not invalidate the consent spontaneously volunteered by [the co-tenant]." *Id.* at 418.

Decisions following *Murphy* are few. The first, *Martin v. United States*, 952 A.2d 181, 188 (D.C. 2008), is easily distinguished. There, the District of Columbia Court of Appeals held a warrantless search invalid in the face of the defendant's refusal to consent. Ignoring the defendant's refusal, the police officers summoned his mother to the residence and obtained her consent in the defendant's (silent) presence. *Id.* at 183. The *Martin* court followed *Murphy*'s interpretation of *Randolph* and held that "appellant's mother's later consent in this case did not

vitiate her son's earlier denial of consent. After his initial refusal, the police could have obtained valid consent to the search only from appellant." *Id.* at 187.

Martin's presence at the time his co-occupant gave consent renders that decision distinguishable from *Murphy*, as well as from petitioner's case. In *Martin*, the defendant not only voiced his objection to the search, but remained present (although silent) when the police summoned his co-tenant and obtained her consent. *Martin*, 952 A.2d at 187.[7] Additionally, the *Martin* court noted "at least some evidence that the police may have prevented Martin from speaking to his mother when she arrived on the scene." *Id.* at 187 n.10.

Richardson v. City of Antioch, 722 F. Supp. 2d 1133, 1140 (N.D. Cal. 2010) (a section 1983 action), is similarly distinguishable because it involved a *contemporaneous dispute* as to consent. While the tenants consented to police entry, the guests and the homeowner herself refused to give their consent. The defendant "had previously informed the Officers that they should not enter her home without a warrant," and there was "no dispute that her house guests reiterated that position when the Officers began to knock and announce their presence." *Id.* at 1140. Indeed, there was "no dispute that the Officers heard the occupants deny them admission and reiterate the need for a warrant to enter." *Id.* (footnote omitted). Therefore, "[a]ccording to the explicit holding in *Randolph*, the

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[7] *United States v. Phillips*, No. 12-20245, 2013 WL 943522 (E.D. Mich. March 11, 2013), presents similar facts. There, the police ignored the defendant's refusal of consent to search, and obtained his mother's consent in defendant's presence. *Id.* at *6.

tenants' consent, counter to the other occupants' objections to the entry, does not qualify as an exception to the warrant requirement under the Fourth Amendment." *Id.*

Finally, in *State v. Caster*, 234 P.3d 1087, *rev. denied*, 246 P.3d 744 (2010), the defendant expressly objected to a warrantless search, and was arrested and removed from the premises. Shortly thereafter, the police obtained consent from the defendant's wife, who had been present when the defendant insisted on a search warrant. *Id.* at 1088. The Oregon Court of Appeals invoked *Murphy* to hold that one co-occupant lacks authority to admit the police "over the then-present objection of the other occupant, whether or not the objecting occupant is subsequently arrested at the scene." *Id.* at 1097. It would therefore appear that *Caster* is the only non-distinguishable published authority to endorse the broad reading of *Murphy* upon which petitioner relies. However, Oregon's court of last resort has not ruled on the issue, and, as of this date, no court has invoked *Caster* as authority for interpreting *Randolph*.

In sum, the Court of Appeal correctly applied the Fourth Amendment's co-occupant consent jurisprudence in a straightforward interpretation of *Randolph*'s bright-line holding that only a physically present occupant's objection proscribes a warrantless entry in the face of a co-occupant's contemporaneous consent to search. An occupant like petitioner who is absent from the threshold colloquy with police due to his legitimate, non-pretextual arrest is bound by the co-occupant's consent. Given that the great weight of authority is against petitioner's

interpretation of *Randolph*, the split of authority does not present a compelling reason for granting certiorari in this case. Moreover, because most of the authorities that followed *Murphy* were predicated on circumstances in which there was a dispute over consent between physically present co-occupants, there is good reason to believe that the conflicting authorities could be largely harmonized.

II. THE UNIQUE FACTS OF PETITIONER'S CASE MAKE IT A POOR VEHICLE FOR RESOLVING ANY SPLIT OF AUTHORITY AS TO THE EFFECT OF AN INTERVENING ARREST ON A CO-OCCUPANT'S PRIOR OBJECTION

In *Murphy*, the Ninth Circuit was confronted with the question of the effectiveness of a second co-occupant's consent to a warrantless search made after the first co-occupant had been arrested and removed from the premises after refusing consent. In petitioner's case, however, that issue is complicated and obscured by a domestic-violence investigation overlay, as well as the fact that the police never sought to obtain petitioner's consent. Rather, petitioner spontaneously volunteered his objection to police entry when the officers were in the midst of responding to an ongoing domestic violence investigation.

Therefore, before reaching the question of whether, or to what extent, a co-occupant's pre-arrest insistence on a search warrant remains effective following his or her lawful arrest and removal, this Court would have to determine whether petitioner's attempt to preempt the officers' domestic violence investigation counted as a refusal to search under the Fourth Amendment. Under *Randolph*, there is good reason to believe that a negative resolution of the preliminary issue would obviate consideration of the question that is the subject of this petition.

The *Randolph* court made it clear there could be no Fourth Amendment objection when the police enter a residence to protect a victim of domestic violence. *Randolph*, 547 U.S. at 118.

> No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists, it would be silly to suggest that the police would commit a tort by entering, say, . . . to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur, however much a spouse or other co-tenant objected. . . . Thus, the question whether the police might lawfully enter over objection in order to provide any protection that might be reasonable is easily answered yes.

Randolph, 547 U.S. at 118.

As is well established, "this Court has continuously emphasized that '[r]easonableness . . . is measured . . . by examining the totality of the circumstances.'" *Randolph*, 547 U.S. at 125 (Breyer, J., concurring) (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)). In his concurring opinion, Justice Breyer cautioned that "were the circumstances to change significantly, so should the result," and "the risk of an ongoing crime or other exigent circumstance can make a critical difference." *Id.* Here, petitioner objected when the officers sought to protect the visibly injured Rojas after they heard a serious verbal altercation. When petitioner objected, therefore, it was in the context of precisely the kind of police activity that *Randolph* placed outside the reach of the Fourth Amendment's warrant requirement. This would seem the type of factual scenario likely to be considered critically different under *Randolph*.

There are other factual aspects of petitioner's case that complicate the consent issue in a unique way. Petitioner was removed from the premises and placed in the squad car after the police noticed the telltale tattoo that potentially tied him to a crime independent of the domestic violence incident. Not only that, but the officers did not seek Rojas's consent until Lopez had identified petitioner as the robber. That is, petitioner was absent from the threshold colloquy because he had been arrested for a separate crime from the one that occasioned the officer's initial entry and his objection. Therefore, the social expectation analysis set forth in *Randolph* would likely play out differently: There is little reason to think a person would assume a co-occupant's refusal of entry during a domestic-violence investigation had prospective, preclusive effect after he had been arrested for a separate armed robbery.

Therefore, given the unique factual circumstances of this case, granting review would hardly assure resolution of the co-occupant consent question petitioner seeks to have resolved.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: April 3, 2013

Respectfully submitted

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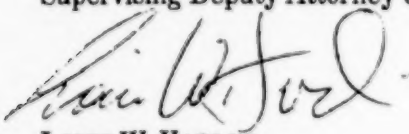

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JOINT APPENDIX

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JUL 31 2013
OFFICE OF THE CLERK

No. 12-7822

IN THE

Supreme Court of the United States

WALTER FERNANDEZ,
Petitioner,

v.

CALIFORNIA,
Respondent.

On Writ of Certiorari to the Court of Appeal of California, Second Appellate District

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 17, 2012
CERTIORARI GRANTED MAY 20, 2013

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RELEVANT DOCKET ENTRIES

01/05/2010	Superior Court of the State of California for the County of Los Angeles. Information filed.
02/11/2010	Superior Court of the State of California for the County of Los Angeles. Defendant's motion to suppress filed.
3/10/2010	Superior Court of the State of California for the County of Los Angeles. Suppression hearing commenced.
6/4/2010	Superior Court of the State of California for the County of Los Angeles. Suppression hearing concluded; motion to suppress denied.
08/12/2010	Superior Court of the State of California for the County of Los Angeles. Trial (jury selection) commenced.
10/25/2010	Superior Court of the State of California for the County of Los Angeles. Trial concluded; jury finds defendant guilty as charged.
4/08/2011	Court of Appeal of California, Second Appellate District. Notice of appeal filed.
8/1/2012	Court of Appeal of California, Second Appellate District. Decision Issued.
09/07/12	Supreme Court of California. Petition for review filed.
10/31/2012	Supreme Court of California. Petition for review denied.

[CERTIFIED FOR PARTIAL PUBLICATION*]

COURT OF APPEAL OF CALIFORNIA,
SECOND DISTRICT

No. B232277

THE PEOPLE,
Plaintiff and Respondent,

v.

WALTER FERNANDEZ,
Defendant and Appellant.

August 1, 2012

Appeal from the Superior Court of
Los Angeles County, No. BA363324,
William C. Ryan, Judge

Steven A. Brody and Gerald Peters, under appointments by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey, Shawn McGahey Webb and Louis W. Karlin, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts II., III., and IV. of the Discussion.

OPINION

SUZUKAWA, J. —

A jury convicted defendant Walter Fernandez of second degree robbery (Pen. Code, § 211) (count 1)[1] and willful infliction of corporal injury on a spouse, cohabitant, or child's parent (§ 273.5, subd. (a)) (count 2); as to count 1, the jury further found that (1) in the commission of the offense, the defendant personally used a dangerous and deadly weapon, to wit, a knife, within the meaning of section 12022, subdivision (b)(1), and (2) the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang, within the meaning of section 186.22, subdivision (b)(1). Defendant pled nolo contendere to possession of a firearm by a felon (§ 12021, subd. (a)(1))[2] (count 3), short-barreled shotgun or rifle activity (§ 12020, subd. (a)(1))[3] (count 4), and possession of ammunition (§ 12316, subd. (b)(1))[4] (count 5). The trial court imposed a sentence of 14 years.

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[1] All further statutory references are to the Penal Code.

[2] Section 12021, subdivision (a)(1) was repealed and replaced by section 29800 without substantive change. (Stats. 2010, ch. 711, § 6, operative Jan. 1, 2012.)

[3] Section 12020, subdivision (a)(1) was repealed and replaced by section 33215 without substantive change. (Stats. 2010, ch. 711, § 6, operative Jan. 1, 2012.)

[4] Section 12316, subdivision (b)(1) was repealed and replaced by section 30305 without substantive change. (Stats. 2010, ch. 711, § 6, operative Jan. 1, 2012.)

In this appeal from the judgment, defendant contends (1) the trial court erred in denying his motion to suppress evidence seized during a warrantless search of his apartment; (2) the trial court abused its discretion by admitting evidence that a suspect was arrested for attempted murder in defendant's apartment; (3) there was insufficient evidence to support the true finding on the gang allegation; and (4) the trial court erred in denying defendant's *Pitchess*[5] motion.

In the published portion of the opinion, we conclude the trial court properly denied defendant's suppression motion. In the unpublished portion, we reject defendant's remaining claims, with the exception of his contention of *Pitchess* error. We conditionally reverse the section 273.5, subdivision (a) conviction for the trial court to conduct an in camera review of one officer's personnel file; in all other respects, we affirm the judgment.

STATEMENT OF FACTS

I. Prosecution Case

A. Percipient Testimony

1. Abel Lopez

On October 12, 2009, at about 11:00 a.m., Abel Lopez was approached after cashing a check near the corner of 14th Street and Magnolia in Los Angeles by a man with light skin, a grey sweater, and a tattoo on his bald head. The man, whom Lopez later identified as defendant, asked what neighborhood Lopez was from. Lopez said, "I'm from Mexico." Defendant

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[5] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 [113 Cal.Rptr. 897, 522 P.2d 305] (*Pitchess*).

laughed and said Lopez was in his territory and should give him his money. He then said, "The D.F.S. rules here. They rule here." Defendant took a knife out of his pocket and pointed it towards Lopez's chest. Lopez put up his hands to protect himself and defendant cut Lopez's wrist.

Lopez tried to run away and, while running, took out his cell phone and called 911. He told the 911 operator he needed help because someone wanted to kill him. Defendant then whistled loudly and three or four men ran out of a building on 14th Street and Magnolia. They hit Lopez in the face and all over his body, knocking him to the ground, where they continued to hit and kick him. When he got up, Lopez did not have his cell phone or wallet;[6] He saw the men running back to the building from which they had come. As a result of the attack, Lopez suffered a deep cut on his left wrist and bruising "and swelling over his body.

Several minutes after the attack, the police and paramedics arrived. Lopez participated in a field showup, where he identified defendant.

2. Detective Clark and Officer Cirrito

Detective Kelly Clark and Officer Joseph Cirrito responded to a police radio dispatch on October 12, 2009. Because the police dispatcher indicated possible involvement by members of the Drifters gang in an assault with a deadly weapon, Clark and Cirrito drove to an alley near Magnolia and 14th Street where they knew Drifters gathered. As they stood in the alley, two men walked by and one said, "[T]he guy is in the apartment." The speaker appeared very

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[6] Lopez told police he had approximately $400 in his wallet.

scared and walked away quickly. When he returned, he again said, "He's in there. He's in the apartment." Immediately thereafter, the detectives saw a tall, light-skinned, Hispanic or White male wearing a light blue T-shirt and khaki pants run through the alley and into the house where the witness was pointing. The house had been restructured into multiple apartments and was a known gang location. A minute or so later, the officers heard sounds of screaming and fighting from the apartment building into which the suspect had run.

Clark and Cirrito called for backup and, once additional officers arrived, knocked on the door of the unit from which they had heard screaming. The door was opened by Roxanne Rojas, who was holding a baby and appeared to be crying. Her face was red and she had a big bump on her nose that looked fresh. She had blood on her shirt and hand that appeared to come from a fresh injury. Cirrito asked what happened and she said she had been in a fight. Cirrito then asked if anyone else was inside the apartment, and she said only her son. When Cirrito asked her to step outside so he could conduct a sweep of the apartment, defendant stepped forward. He was dressed only in boxer shorts and seemed very agitated. He said, "You don't have any right to come in here. I know my rights." Cirrito removed him from the residence and took him into custody.

While Cirrito and Clark arrested defendant at the rear of the house, two men ran out of the front of the house. Officers detained them for questioning.

After defendant was removed from the scene, officers secured the apartment. Clark then went back to Rojas, told her that defendant had been identified as a robbery suspect, and asked for Rojas's consent to

search the apartment. Rojas gave consent, orally and in writing. During the ensuing search, officers found Drifters gang paraphernalia, a butterfly knife, boxing gloves, and clothing, including black pants and a light blue shirt. None of the items stolen from the victim was ever found.

The officers interviewed Rojas about her injuries. She said that when defendant entered the apartment, she confronted him about his relationship with a woman named Vanessa. They argued, and defendant struck Rojas in the face. The officers also spoke to Rojas's four-year-old son, Christian, who told them defendant had a gun. Officers recovered a sawed-off shotgun from a heating unit where Christian told them it was hidden.

Two days later, Cirrito interviewed Rojas again. She said several times that she did not want to be a "rat" and that defendant would be very upset if he knew she was talking to the police. She denied that defendant struck her and said she had been struck in the face by Vanessa.

B. Expert Testimony

1. Defendant's Active Gang Membership

Cirrito testified for the prosecution as a gang expert, opining that defendant was an active member of the Drifters, a Latino street gang. He said that the Drifters began as a "car club," but moved into criminal activities in the 1980's. By the 1990's, they began to engage in more violent crimes, such as assaults, carjackings, attempted murders, and narcotics sales. As of October 2009, there were about 140 active Drifters members. In 2009, defendant told officers he had been a member of the Drifters (12th Street Bagos clique) for nine years.

The Drifters's territory includes a "stronghold" in the area between 14th Street and 15th Street, and between Hoover and Menlo. The stronghold is an area where gang members can retreat if there is danger, and from which members can escape through secret passageways.

Cirrito testified that defendant had at least four tattoos that indicated his affiliation with the Drifters: "D.F.S.," an abbreviation for Drifters, was tattooed on his leg; "Drifters" was tattooed on his back; "L.A." was tattooed on his chest; and a gas mask and fedora were tattooed on his back. According to Cirrito, "[N]ot everyone that gets an L.A. on there is a gang member, but there is a trend that gang members, especially the Latino gangs[,] will use that L.A. logo. It represents L.A. where they take a lot of pride [in] where they're from" Cirrito also testified that the gas mask and fedora represent an underground rap group called Psychoheads, which "talk[] a lot about weed, smoking weed and so on. It's an underground group, but they're very popular with the neighborhood gangsters. A lot of gang members will put that on because, again, it's — we talk about reputation and pride in the area. Psycho-heads came from the Pico Union area, which is close by that particular area of the Drifters."

Cirrito testified that a "moniker" is a nickname typically given to a gang member. Defendant's moniker is "Blocks." The moniker "Blocks" appeared in a Drifters "roll call" (list of active gang members) on a water heater near defendant's apartment. "Blocks" also appeared in tagging on a garage door a few days after defendant's arrest, which' read "D.F.S. [(Drifters)], Bagos, Block[s]." "Bagos" is the Drifters clique in the area in which defendant lives.

Cirrito testified that an art book recovered from defendant's bedroom oh October 12, 2009, also evidences defendant's gang membership. Specifically, he noted that the book contains a roll call with monikers and references to "D.F.S. 13," "D.F.S. 12th Street, Bagos," "Blocks," "Rox," "Roxy, 12th Street," "Drifters," and "Drifters 13." Cirrito said that "13" indicates an affiliation with the Mexican mafia, the "M.A."

Cirrito testified that baseball caps were also recovered from defendant's living room following his arrest; one cap was brown, with "L.A." and "Drifters" written inside, and another was blue and embroidered with the name "Trigger," a documented Drifters member.

In summary, Cirrito opined that defendant was an active member of the Drifters because he had tattoos that reference the Drifters gang; he goes by the moniker "Blocks"; he admitted to officers that he has been a member of the Drifters; he had gang paraphernalia in his home; he lived in a Drifters stronghold; and during the incident for which he was arrested, he said, "Where are you from? D.F.S. rules here."

2. Cirrito's Opinion That the Robbery Was Gang Related

Cirrito testified that gang members care deeply about their gang's reputation in the community because "reputation means everything to them." He said that gangs want respect from rival gangs, but they also want to terrorize the neighborhoods in which they operate so people will be afraid to come forward and talk about the gang's criminal activities. A gang makes itself known in the community in

several ways, primarily by committing crimes and tagging.

The Drifters establish their territory "[b]y committing crimes in — just open daylight. There's fear and intimidation. . . . [S]ome of these younger people . . . want to be gang members. Some of them, it's almost peer pressure. Some of them are actually forced because they live in that neighborhood. They get beat up. They're getting — I'll say attacked or pocket checked, and, eventually, they give in to just be part of this gang."

Cirrito opined that Drifters members individually and collectively engage in a pattern of criminal gang activity. Their primary activities are robbery, grand theft auto, assault with a deadly weapon, narcotics, and attempted murder.

The prosecutor asked Cirrito the following hypothetical: "I want you to assume that the location we're talking about is 14th and Magnolia, that it is twelve o'clock in the day, broad daylight for other people to see and that you have an individual who had recently been to a check cashing location or a similar location. He is leaving his girlfriend's house in that area, 14th and Magnolia. He's alone. He is approached by someone with a distinctive tattoo on the top of their head who is taller than that individual, that that person comes up to the man who is alone and asks that person, 'Where are you from?' That the person says — we'll call the smaller person the victim. He says, I'm not from anywhere. I'm from Mexico,' that the suspect says 'Drifters rule here,' in Spanish. 'This is Drifters, D.F.S.,' something to that effect multiple times, and the location is 14th and Magnolia. The suspect then demands the wallet of the victim and takes out a knife, points the knife at

the victim, and the victim, in an attempt to defend himself, puts [his] wrist in front of [his] body, and the knife actually punctures through the sweater into the wrist of the victim. The victim starts to run, at which point the suspect then whistles, and three to four additional presumably other gang members come to attack the victim. The victim calls 911 and is subsequently punched, kicked, beaten and has his wallet stolen, his Mexican ID is stolen, his cell phone is stolen, and the cash that he had recently cashed at the check cashing is taken. He sees the suspect with the knife and the tattoo along with the three to four others, then all flee, and he participates in a field showup and is able to identify the person with the tattoo, the person with the knife. His property is never recovered. Under that set of circumstances, would you believe, Officer, based on your background, training and experience, that that hypothetical, whether the act, the robbery itself, would be committed for the benefit of or at the direction of or in association with a criminal street gang, assuming that that particular location, 14th and Magnolia, was the stronghold of that gang with the specific intent to promote, further or assist in criminal conduct by gang members?"

Cirrito opined that, for the following reasons, he believed the hypothetical crime to be gang related: "It almost falls under the definition of what a gang is. A gang has three or more people who formally or informally have a common name, sign[,] or symbol[,] who engage or have engaged individually or collectively in a crime that causes fear and intimidation within a community, and . . . one of the crimes under this definition of 186.22 is a robbery. And the fact that it was done in broad daylight in this gang location, it's very bold to do that in daylight. You must feel — that

individual must feel that he has a lot of power in that community. That person must feel that . . . no one is going to rat me out. No one's going to tell them who I was. The idea that he whistles others, that it was premeditated, that they're waiting, they have this all set up, and that these three other individuals or four individuals assist this one individual in taking property of one person. To even go back on that, when that person walks up on this person and says, 'Where are you from?' For most citizens who live in this area, when they hear that, they know I'm getting banged on. He's asking me where I'm from. If you think about it, an individual — anybody that approaches you and you don't know who they are and they engage in a conversation, you get a little defensive like what does this person want? Now, he's telling you 'Drifters rule here.' I'm basically now thinking — well, this person is thinking I'm either going to get robbed; I'm going to get jumped; beat up. I might even be killed because this guy's a gang member, and it's not just him that I have to fight. It's all — it's the gang. He's telling me he's from a gang, Drifters, for example. So in my opinion, this is for the benefit of a gang. The robbery itself — the cell phones could be used. They could change out the SIM card. They could be used for narcotics sales. They could be pawned off for a few bucks. The Mexican ID could be used to — for someone that doesn't have ID. They could change it. It could be used for fraud, identity theft. The $400 could be used for buying more narcotics. It could be for buying guns, weapons. It could be paying for books for people who have recently been incarcerated and are in jail and that they need books for phone calls and cigarettes and anything else that they need. So my feeling is that this crime was done for the benefit of a gang."

II. Defense Case

Roxanne Rojas testified that on October 12, 2009, she and defendant were living together in the apartment where defendant was arrested. About 11:00 a.m., defendant left the apartment to buy tacos and cigarettes; Rojas remained home with their two-month-old daughter and four-year-old son. While defendant was gone, a woman named Vanessa came to the apartment, and she and Rojas fought. Rojas and Vanessa were both injured during the fight. When defendant returned to the apartment through the back door, Vanessa left out the front door. Defendant saw that Rojas was injured and began to yell at her. Moments later, an officer arrived. The officer asked Rojas to let him in, and Rojas "didn't say yes. I didn't say no. I said let me get my children." Rojas agreed that defendant has a Drifters tattoo, but said he was no longer active in the gang.

Defendant testified that he had been involved with the Drifters earlier in his life. He was "forcibly jumped in" when he was 18 or 19 years old and he "had to basically like go with the flow." He was never heavily involved with the Drifters; "[i]t always was just about like simply like me living there . . . like I'm out mere doing stuff in the neighborhood . . . hanging out with people I grew up with." He admitted that he had been convicted of receiving stolen property and served time in prison. He said he was released in 2007 and turned his life around. He began working and got an apartment in Marina del Rey for himself, Rojas, and her son. When Rojas got pregnant with her second child, the family moved to a two-bedroom apartment on 15th Street and Magnolia, but he had nothing to do with the Drifters.

Defendant testified that on the morning of October 12, 2009, he woke up late, played with his son, and then went out to get tacos for the family. On 14th Street, he was approached by a Hispanic man who appeared to be drunk. The man said, "Crazy Riders," which is a rival gang from the area. Defendant ignored him and kept walking. The man continued to talk to him and then "got into the point where he's coming at me." Defendant pushed him away, and the two men got into a fistfight. When it was over, defendant continued to the liquor, store to buy cigarettes and then went home. Defendant never saw the man again. When he returned home, Rojas told him a girl had come to the house looking for him, and she and the girl had gotten into a fight. Defendant was upset that Rojas had let the girl in, and he and Rojas began yelling at one another. He did not hit Rojas during the argument. The police arrived a few minutes later and arrested him.

On cross-examination, defendant conceded that he has four prior felony convictions for theft-related crimes. He said "Blocks" or "Blockhead" is his nickname, but it is not a gang moniker.

III. Sentencing and Appeal

On October 8, 2010, defendant pled nolo contendere to counts 3, 4, and 5 (firearms and ammunition possession). In connection with defendant's plea, the parties agreed that defendant's son would not be called as a witness in the jury trial and the prosecution would not reference a gun seized at defendant's home after his arrest. On October 25, 2010, the jury convicted defendant of counts 1 and 2 (second degree robbery and corporal injury on a spouse, cohabitant, or child's parent); as to count 1, the jury further found that (1) in the commission of the offense,

defendant had personally used a dangerous and deadly weapon, and (2) the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang.

As to count 1, the court sentenced defendant to 14 years (midterm of three years, plus an additional consecutive term of 10 years pursuant to § 186.22, subd. (b)(1)(A), plus an additional term of one year pursuant to § 12022, subd. (b)(1)). As to count 2, the court sentenced defendant to the midterm of three years, to run concurrent with the principal term. As to counts 3, 4, and 5, the court sentenced defendant to the midterm of two years, to run concurrent with the principal term.

Defendant timely appealed.

DISCUSSION

Defendant contends (1) the trial court erred by denying his motion to suppress evidence seized in his apartment during a warrantless search; (2) the trial court abused its discretion by admitting evidence that a suspect was arrested for attempted murder in defendant's apartment; (3) there was insufficient evidence to support the true finding on the gang allegation; and (4) the trial court erred by denying defendant's *Pitchess* motion. We consider these issues below.

I. The Trial Court Did Not Err by Denying Defendant's Motion to Suppress

Prior to trial, defendant filed a motion pursuant to section 1538.5 to suppress evidence seized during a warrantless search of his apartment following his arrest. Specifically, defendant sought to exclude (1) a

Mossberg New Haven 20-gauge shotgun, (2) Remington 20-gauge shotgun ammunition, (3) a knife with a four-and-one-half-inch stainless steel blade, (4) any currency seized during the search, and (5) any other evidence seized, including clothing, notebooks, and boxing gloves. The trial court denied the motion to suppress. We review the order de novo to determine whether, on the facts found by the trial court on the basis of substantial evidence, the search or seizure was reasonable under the Fourth Amendment. (*People v. Duncan* (2008) 160 Cal.App.4th 1014, 1017 [73 Cal.Rptr.3d 264].)

Defendant contends that the trial court erred by denying the motion to suppress, noting that the officers did not obtain a search warrant and he objected to their entry into his apartment. Citing *Georgia v. Randolph* (2006) 547 U.S. 103, 114 [164 L.Ed.2d 208, 126 S.Ct. 1515] (*Randolph*), and *U.S. v. Murphy* (9th Cir. 2008) 516 F.3d 1117 (*Murphy*), he urges that Rojas's subsequent consent to a search of their apartment was invalid and any evidence obtained was inadmissible. The Attorney General disagrees, contending that Rojas's consent provided a constitutionally permissible basis for the search once defendant was lawfully removed from the apartment.

We begin by discussing *Randolph*, in which the United States Supreme Court held that police officers may not constitutionally conduct a warrantless search of a home over the express refusal of consent by a physically present resident, even if another resident consents to a search. We then discuss the split of authority among the federal circuit courts as to *Randolph*'s application to a case like the present one, where consent to search is given by a defendant's cotenant after the defendant is arrested and removed

from the residence. We conclude that under the circumstances of the present case, the search was lawful.

A. *Georgia v. Randolph*

In *Randolph*, *supra*, 547 U.S. 103, defendant's *wife*, Janet *Randolph*, called police to the family home and complained that her husband was a cocaine user. An officer asked the defendant's permission to search the house; he refused. The officer then sought Mrs. Randolph's consent to search, which she gave. In the defendant's bedroom, the officer discovered cocaine and drug paraphernalia. (*Id.* at p. 107.)

The defendant moved to suppress the evidence as products of a warrantless search. (*Randolph*, *supra*, 547 U.S. at p. 107.) The Supreme Court granted certiorari "to resolve a split of authority on whether one occupant may give law enforcement effective consent to search shared premises, as against a cotenant who is present and states a refusal to permit the search." (*Id.* at p. 108.)

The court noted that to the Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person's house as unreasonable per se, "one 'jealously and carefully drawn' exception, *Jones v. United States*, 357 U.S. 493, 499 [2 L.Ed.2d 1514, 78 S.Ct. 1253] (1958), recognizes the validity of searches with the voluntary consent of an individual possessing authority, [*Illinois v.*] *Rodriguez*, 497 U.S. [177,] 181 [111 L.Ed.2d 148, 110 S.Ct. 2793] [(1990)]. That person might be the householder against whom evidence is sought, *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 [36 L.Ed.2d 854, 93 S.Ct. 2041] (1973), or a fellow occupant who shares common authority over property, when the suspect is absent, [*United States v.*] *Matlock*,

[415 U.S. 164,] 170 [39 L.Ed.2d 242, 94 S.Ct. 988] [(1974)]." (*Randolph*, *supra*, 547 U.S. at p. 109.) The exception recognized in those cases "does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.'" (*Id.* at p. HO.)[7]

The "constant element" in assessing Fourth Amendment reasonableness in the consent cases, the Supreme Court explained, is "the great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules. [Citation.] *Matlock* accordingly not only holds that a solitary co-inhabitant may sometimes consent to a search of shared premises, but stands for the proposition that the reasonableness of such a search is in significant

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[7] In *Illinois v. Rodriguez*, *supra*, 497 U.S. at pages 179-180 (*Rodriguez*), the defendant's girlfriend consented to an officer's entry into the apartment she and the defendant shared, where the defendant was then sleeping. The Supreme Court held that evidence seized during the warrantless search of the apartment could be introduced against the defendant because the authorities reasonably believed his girlfriend had the authority to consent. (*Id.* at p. 189.) In *United States v. Matlock*, *supra*, 415 U.S. 164, 166, 177 (*Matlock*), the court held that evidence seized during a warrantless search of the defendant's bedroom could be admitted against him because his girlfriend consented to the search; the defendant's consent was neither sought nor obtained, although he was at the time of the search in police custody in the front yard of the home.

part a function of commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other's interests." (*Randolph*, *supra*, 547 U.S. at p. 111.) Such an understanding includes an assumption tenants "usually make about their common authority when they share quarters. They understand that any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another. As Matlock put it, shared tenancy is understood to include an 'assumption of risk,' on which police officers are entitled to rely" (*Ibid.*)

The situation differs, however, when a cohabitant is present and denying entrance: "[I]t is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying stay out. Without some very good reason, no sensible person would go inside under those conditions. . . . [¶] The visitor's reticence without some such good reason would show not timidity but a realization that when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority." (*Randolph*, *supra*, 547 U.S. at pp. 113-114.) "In sum, there is no common understanding that one cotenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders." (*Id.* at p. 114.)

Applying these principles, the court concluded that "[s]ince the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting

co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all." (*Randolph*, *supra*, 547 U.S. at p. 114.) It held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a *physically present resident* cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." (*Id.* at p. 120, italics added.)

The court then reaffirmed the continuing vitality of *Matlock* and *Rodriguez*, explaining as follows: "Although the *Matlock* defendant was not present with the opportunity to object, he was in a squad car not far away;' the *Rodriguez* defendant was actually asleep in the apartment, and the police might have roused him with a knock on the door before they entered with only the consent of an apparent co-tenant. If those cases are not to be undercut by today's holding, we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.

"This is the line we draw, and we think the formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication

when he expresses it. For the very reason that *Rodriguez* held it would be unjustifiably impractical to require the police to take affirmative steps to confirm the actual authority of a consenting individual whose authority was apparent, we think it would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if we were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received. There is no ready reason to believe that efforts to invite a refusal would make a difference in many cases, whereas every co-tenant consent case would turn into a test about the adequacy of the police's efforts to consult with a potential objector. Better to accept the formalism of distinguishing *Matlock* from this case than to impose a requirement, time consuming in the field and in the courtroom, with no apparent systemic justification. The pragmatic decision to accept the simplicity of this line is, moreover, supported by the substantial number of instances in which suspects who are asked for permission to search actually consent [fn. omitted], albeit imprudently, a fact that undercuts any argument that the police should try to locate a suspected inhabitant because his denial of consent would be a foregone conclusion." (*Randolph*, *supra*, 547 U.S. at pp. 121-122.)

The case before it, the court concluded, "invites a straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant. Scott Randolph's refusal is clear, and nothing in the record justifies the search on grounds independent of Janet Randolph's consent. The State does not argue that she gave any

indication to the police of a need for protection inside the house that might have justified entry into the portion of the premises where the police found the powdery straw (which, if lawfully seized, could have been used when attempting to establish probable cause for the warrant issued later). Nor does the State claim that the entry and search should be upheld under the rubric of exigent circumstances, owing to some apprehension by the police officers that Scott Randolph would destroy evidence of drug use before any warrant could be obtained." (*Randolph*, *supra*, 547 U.S. at pp. 122-123.)

B. *U.S. v. Murphy*

In *Murphy*, *supra*, 516 F.3d 1117, the Ninth Circuit extended *Randolph* to hold that if a defendant expressly withholds consent to search, a warrantless search conducted *after* the defendant has left or been removed from the residence is invalid even if a cotenant subsequently consents. In *Murphy*, the defendant was living in a storage unit rented by Dennis Roper. Officers arrested the defendant, who refused to consent to a search of the storage unit; later, they arrested Roper, who consented to a search. During the search,

The defendant challenged the validity of Roper's consent to the search. (*Murphy*, *supra*, 516 F.3d at pp. 1119-1120.) The Ninth Circuit held that the search violated the Fourth Amendment, rejecting the government's contention that the present case was distinguishable from *Randolph* because the defendant was not present when Roper consented to the search. It explained: "The . . . distinction that the government attempts to make between this case and *Randolph* is that in the former, unlike in the latter,

the objecting co-tenant was not physically present when the other tenant gave consent to the search. Here, Murphy refused consent and was subsequently arrested and removed from the scene. Two hours later, officers located Roper and obtained consent from him to search the units. Roper did not know that Murphy had previously refused consent and Murphy was not present to object once again to the second search. We see no reason, however, why Murphy's arrest should vitiate the objection he had already registered to the search. We hold that when a co-tenant objects to a search and another party with common authority subsequently gives consent to that search in the absence of the first co-tenant the search is invalid as to the objecting co-tenant.

"We find support for our holding in the *Randolph* Court's treatment of the related issue of police removal of a tenant from the scene for the purpose of *preventing* him from objecting to a search. [Citation.] The Court held that third party consent to a search is valid only[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection.' [Citation.] If the police cannot prevent a co-tenant from objecting to a search through arrest, surely they cannot arrest a co-tenant and then seek to ignore an objection he has already made. Nor, more generally, do we see any reason to limit the *Randolph* rule to an objecting tenant's removal by police. Once a co-tenant has registered his objection, his refusal to grant consent remains effective barring some objective manifestation that he has changed his position and no longer objects. The rule that *Randolph* establishes is that when one co-tenant objects and the other consents, a valid search may occur only with respect to the consenting tenant. It is true that

the consent of either co-tenant may be sufficient in the absence of an objection by the other, either because he simply fails to object or because he is not present to do so. Nevertheless, when an objection has been made by either tenant prior to the officers' entry, the search is not valid as to him and no evidence seized may be used against him. [Fn. omitted.] Rather, as in this case, in the absence of exigent circumstances, the police must obtain a warrant before conducting the search." (*Murphy*, *supra*, 516 F.3d at pp. 1124-1125.)

C. Subsequent Case Law

Four federal circuit courts and at least two state Supreme Courts have rejected the Ninth Circuit's analysis in *Murphy*; they hold that even if a defendant expressly refuses to allow officers to search his residence, a cohabitant's consent given after a defendant leaves or is lawfully removed will support a warrantless search. *U.S. v. Hudspeth* (8th Cir. 2008) 518 F.3d 954 (*Hudspeth*) is one such case. There, officers' executed a search warrant at the defendant's workplace and discovered child pornography on the defendant's computer. The defendant was arrested for possession of child pornography. The arresting officer asked the defendant for permission to search his home computer; he refused. Law enforcement officers then went to the defendant's home, where his wife gave permission to seize the home computer. On that computer, investigators found additional child pornography. (*Id.* at pp. 955-956.) The defendant was indicted for possession of child pornography and pled guilty after unsuccessfully moving to suppress the evidence seized during the searches of his work and home computers. (*Id.* at p. 956.)

As relevant here, the Eighth Circuit held that the warrantless search of the defendant's home, computer did not violate the Fourth Amendment. It explained as follows: "The legal issue of whether an officer's knowledge of the prior express refusal by one co-tenant negates the later obtained consent of another authorized co-tenant is a matter of first impression in this court. We will answer this compound legal question by answering the separate legal questions involved.

> "First, we know Mrs. Hudspeth was a co-tenant authorized to give the officers consent to search. [Citation.]. . . .
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> "Second, unlike *Randolph*, the officers in the present case were not con-fronted with asocial custom' dilemma, where two physically present co-tenants have contemporaneous competing interests and one consents to a search, while the other objects. Instead, when Cpl. Nash asked for Mrs. Hudspeth's consent, Hudspeth was not present because he had been lawfully arrested and jailed based on evidence obtained wholly apart from the evidence sought on the home computer. Thus, this rationale for the narrow holding of *Randolph*, which repeatedly referenced the defendant's physical presence *and* immediate objection, is inapplicable here, [¶] . . . [¶]
>
> "The *Randolph* opinion repeatedly referred to an 'express refusal of consent by *a physically present* resident.' *Randolph supra*], 547 U.S. at [p.] 120 [126 S.Ct. 1515] (emphasis added); *e.g.*, *id.* at [pp.] 108, 109, 114, 121-23 [126 S.Ct. 1515]. The *Randolph* majority candidly admitted 'we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact *at the door and*

> *objects*, the co-tenant's permission does not suffice for a reasonable search.' *Id.* at [p.] 121 [126 S.Ct. 1515] (emphasis added). Hudspeth was not at the door and objecting and does not fall within *Randolph*'s fine line. . . .

"The Fourth Amendment does not prohibit warrantless searches and seizures, nor does the Fourth Amendment always prohibit warrantless searches and seizures when the defendant previously objected to the search and seizure. 'What [Hudspeth] is assured by the Fourth Amendment itself, however, is . . . no such search will occur that is "unreasonable." *Rodriguez*[, *supra*], 497 U.S. at [p.] 183 [110 S.Ct. 2793]. As the Supreme Court explains it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his [or her] own right.' *Matlock*[, *supra*], 415 U.S. at [p.] 171 n. 7 [94 S.Ct. 988]. And the absent, expressly objecting co-inhabitant has assumed the risk' that another co-inhabitant 'might permit the common area to be searched.' *Id.* The authorized co-tenant may give consent for several reasons including an unawareness of contraband on the premises, or a desire to protect oneself or others (as here, Mrs. Hudspeth, in the self-interest of herself and her children, consented to the seizure of the home computer to prevent the placement of an armed, uniformed law enforcement officer in her home to guard the evidence while a search warrant was obtained).

> "Under the totality of circumstances of the present case, maintaining the Fourth Amendment's touchstone requirement against unreasonable searches and seizures, we conclude the seizure of Hudspeth's home computer was reasonable and the Fourth Amendment was not violated

> when the officers sought Mrs. Hudspeth's consent despite having received Hudspeth's previous refusal. We affirm the district court's denial of Hudspeth's motion to suppress the evidence obtained from the warrantless seizure of Hudspeth's home computer." (*Hudspeth*, *supra*, 518 F.3d at pp. 960-961.)

The Seventh Circuit followed Hudspeth (and declined to follow *Murphy*) in *U.S. v. Henderson* (7th Cir. 2008) 536 F.3d 776 (*Henderson*). There, police were called to the home of the defendant and his wife, Patricia, to investigate a report of domestic abuse. Patricia admitted police into the home, where in "unequivocal terms" the defendant ordered them out.[8] (536 F.3d at p. 777.) The officers arrested the defendant for domestic battery and took him to jail. After his arrest and removal from the scene, Patricia signed a consent-to-search form and led the police on a search that uncovered, firearms, crack cocaine, and items indicative of drug dealing. The defendant was indicted on federal weapon and drug charges.

The defendant moved to suppress the evidence recovered from his home, arguing that the search was unreasonable under the Fourth Amendment based on the Supreme Court's decision in *Randolph*. (*Henderson*,* *supra*, 536 F.3d at p. 777.) The Seventh Circuit disagreed: "Henderson argues that his objection remained in force to override Patricia's subsequent consent. He, like the Ninth Circuit, interprets *Randolph* as not confined to its circumstances, that is, as

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[8] According to the court: "After a brief exchange, Henderson told the officers to[g]et the [expletive] out of my house' — which the district court reasonably construed as an objection to a search." (*Henderson*, *supra*, 536 F.3d at pp. 777-778.)

not limited to a disputed consent by two contemporaneously present residents with authority. On this broader reading of *Randolph*, a one-time objection by one is sufficient to permanently disable the other from *ever* validly consenting to a search of their shared premises. We think this extends *Randolph* too far. *Randolph* itself, we observed in [*U.S. v.*] *Groves*, [530 F.3d 506 (7th Cir. 2008)], expressly disinvites' any reading broader than its specific facts.

"Like the Eighth Circuit, we see the contemporaneous presence of the objecting and consenting cotenants as indispensable to the decision in *Randolph*. Indeed, the fact of a conflict between present co-occupants plays a vital role in the *Randolph* majority's 'social expectations' premise; a third party, attuned to societal customs regarding shared premises, would not,[w]ithout some very good reason,' enter when faced with a disputed invitation between cotenants. *Randolph supra*], 547 U.S. at [p.] 113 [126 S.Ct. 1515]. The calculus shifts, however, when the tenant seeking to deny entry is no longer present. His objection loses its force because he is not there to enforce it, or perhaps (if we understand the Court's rationale correctly) because the affront to his authority to assert or waive his privacy interest is no longer an issue. As between two present but disagreeing residents with authority, the tie goes to the objector; police may not search based on the consent of one in the face of a physically present inhabitant's express refusal of consent' to search. *Id.* at [p.] 122 [126 S.Ct. 1515]. We do not read *Randolph* as vesting the objector with an absolute veto; nothing in the majority opinion suggests the Court was creating a rule of continuing objection." (*Henderson*, *supra*, 536 F.3d at pp. 783-784.)

"Neither the Eighth nor the Ninth Circuit considered the limiting effect of Justice Breyer's concurrence on the scope of the majority opinion. As we have noted, Justice Breyer joined the other four members of the majority with the understanding that the Court's opinion was 'case specific' and 'does not apply where the objector is not present and objecting.' [*Randolph*, *supra*, 547 U.S.] at [pp.] 126-[1]27 [126 S.Ct. 1515] (Breyer, J., concurring) (internal quotation marks omitted). That, and the specific limiting language in the majority opinion itself, convince us that Randolph's holding ought not be extended beyond the circumstances at issue there *see id.* at [p.] 106 [126 S.Ct. 1515] ('We hold that, *in the circumstances here at issue*, a *physically present* co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.') (emphasis added).

"The Ninth Circuit's decision in *Murphy* essentially reads the presence requirement out of *Randolph*, expanding its holding beyond its express terms and giving rise to many questions with no readily identifiable principles to turn to for answers. If an objecting co-occupant's presence is not required, are there any limits to the superiority or duration of his objection? What circumstances (if any) operate to reinstate a co-occupant's authority to consent to a search? May an occupant arrested or interviewed away from the home preemptively object to a police request to search and effectively disable his co-occupants from consenting even in his absence? *Murphy*'s answer — that the objecting occupant's objection is binding until he, and only he, objectively mani-

> fests his consent to a search — ignores *Randolph*'s social-expectations foundation. A prior objection by an occupant who is no longer present would not be enough to deter a sensible third party from accepting an invitation to enter by a co-occupant who is present with authority to extend the invitation. Under these circumstances even an initially reluctant guest would feel confident he was not breaking any unwritten social rules by entering. Just as a tenant's mere presence is not enough to override his cotenant's consent, *see Rodriguez*[, *supra*], 497 U.S. at [p.] 177 [110 S.Ct. 2793] (tenant asleep in the next room), so too his objection is not enough if he is absent from the later entry by authorities with the voluntary consent of his cotenant. [¶] . . . [¶]

"Our conclusion, like the Eighth Circuit's, implements *Randolph*'s limiting language and the Court's stated intent to maintain the vitality of *Matlock* and *Rodriguez*. Absent exigent circumstances, a warrantless search of a home based on a cotenant's consent is unreasonable in the face of a present tenant's express objection. Once the tenant leaves, however, social expectations shift, and the tenant assumes the risk that a cotenant may allow the police to enter even knowing that the tenant would object or continue to object if present. Both presence *and* objection by the tenant are required to render a consent search unreasonable as to him.

> "Here, it is undisputed that Henderson objected to the presence of the police in his home. Once he was validly arrested for domestic battery and taken to jail, however, his objection lost its force, and Patricia was free to authorize a search of the home. This she readily did. Patricia's consent

rendered the warrantless search reasonable under the Fourth Amendment, and the evidence need not have been suppressed. (Fn. omitted.)" (*Henderson*, *supra*, 536 F.3d at pp. 784-785.)

At least two other federal circuit courts and two state Supreme Courts have followed *Hudspeth* and *Henderson* and declined to follow *Murphy*. (*See U.S. v. Shrader* (4th Cir. 2012) 675 F.3d 300, 307; *U.S. v. Cooke* (5th Cir. 2012) 674 F.3d 491, 499; *People v. Strimple* (Colo. 2012) 267 P.3d 1219, 1221-1226; *State v. St. Martin* (2011) 334 Wis.2d 290, 306-310 [800 N.W.2d 858].)

D. Analysis

We conclude that *Randolph* does not require exclusion of the evidence obtained in the warrantless search of defendant's home. We begin by noting that, like the federal appellate cases discussed above, the facts here differ in a critical way from those of *Randolph*. While the defendant in *Randolph* was present and continued to object to a search of his home, in the present case defendant had been arrested and removed from the apartment before Rojas consented to a search. Thus, unlike in *Randolph*, there was in this case no cotenant "*who is present* and states a refusal to permit the search." (*Randolph*, *supra*, 547 U.S. at p. 108, italics added.)

Defendant's absence from the home when Rojas consented to a search of the apartment is, we believe, determinative. *Randolph* did not overturn prior cases holding that a coinhabitant may give effective consent to search a shared residence; to the contrary, the *Randolph* court explicitly affirmed the vitality of those cases. (*Randolph*, *supra*, 547 U.S. at p. 121.) It did so, moreover, even though it noted that the

defendants in both *Matlock* and *Rodriguez* were nearby when each cotenant's consent was secured — indeed, the *Rodriguez* defendant was asleep inside the apartment — and thus could have been asked to consent as well. In other words, the *Randolph* court distinguished between cases in which a defendant *was present and objected* to a search, on the one hand, and cases in which a defendant was *not present* and therefore could not object to a search, on the other. The court recognized that it was "drawing a fine line," but believed its formalism was justified so long as there was no evidence that police had removed a potentially objecting tenant from the scene for the sake of avoiding a possible objection. (*Ibid.*)

We believe that the line we draw is consistent with that drawn by the Supreme Court in *Randolph*. As in *Randolph*, the line we draw is a clear one, distinguishing between cases in which a defendant is present and objecting to a search, and those in which a defendant has been lawfully arrested and thus is no longer present when a cotenant consents to a search of a shared residence. It thus preserves the "simple clarity of complementary rules" established by *Randolph*. (*Randolph, supra*, 547 U.S. at p. 121.)

Further, our rule preserves the law enforcement prerogatives recognized by *Randolph*. As we have said, *Randolph* expressly reaffirmed the holdings of *Matlock* and *Rodriguez*, noting that "it would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if we were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received." (*Randolph, supra*, 547 U.S. at p. 122.) We believe that requiring officers who have

already secured the consent of a defendant's cotenant to also secure the consent of an absent defendant would similarly and needlessly limit the capacity of law enforcement to respond to "ostensibly legitimate opportunities in the field." (*Ibid.*)

We note, as the Seventh Circuit did in *Henderson*, that the rule advocated by defendant and adopted by the Ninth Circuit in *Murphy* permits "a one-time objection" by one cotenant to "permanently disable the other [cotenant] from *ever* validly consenting to a search of their shared premises." (*Henderson*, *supra*, 536 F.3d at p. 783.) Like *Henderson*, we think such a rule "extends *Randolph* too far." (*Ibid.*)

Finally, like the Fourth, Fifth, Seventh, and Eighth Circuits, we believe that the defendant's presence was indispensible to the decision in *Randolph*. We again quote *Henderson*, which well articulated the analysis: "[T]he fact of a conflict between present co-occupants plays a vital role in the *Randolph* majority's 'social expectations' premise; a third party, attuned to societal customs regarding shared premises, would not, [w]ithout some very good reason,' enter when faced with a disputed invitation between cotenants. *Randolph supra*], 547 U.S. at [p.] 113 [126 S.Ct. 1515]. The calculus shifts, however, when the tenant seeking to deny entry is no longer present. His objection loses its force because he is not there to enforce it. . . ." (*Henderson*, *supra*, 536 F.3d at pp. 783-784.)

For all of these reasons, we conclude that Rojas's consent to a search of the apartment she shared with defendant was valid, and thus the trial court did not err in denying defendant's motion to exclude.

II. The Trial Court Did Not Err When It Admitted Evidence of a Prior Arrest in Defendant's Apartment

Defendant contends that the trial court abused its discretion by admitting evidence that an attempted murder suspect was arrested in his apartment. He urges that the evidence was substantially more prejudicial than probative, and there is a reasonable probability that the outcome would have been more favorable to him if the evidence had been excluded. For the following reasons, we disagree.

A. Facts

Officer Cirrito testified that on September 12, 2009, one month before the arrest in the present case, Drifters members Michael Rocco and Samuel Cruz were arrested for attempted murder. They were convicted on August 27, 2010. Rocco was arrested in defendant's living room; Rojas, with defendant behind her, opened the apartment door to the officers who arrested Rocco. Cruz was arrested in the crawl space under defendant's apartment building.

Defendant moved to exclude evidence of the arrest under Evidence Code section 352, contending that the evidence was unduly prejudicial because "[t]he risk of guilt by association is obviously extreme." The prosecutor disagreed, noting that Rojas denied defendant was an active gang member, and "This is very fresh. This is something that happened a month before the incident in this case, which would corroborate the fact that he is an active gang member that's benefiting the gang. He's hiding out gang members in his apartment to avoid getting arrested."

The court denied the motion to exclude, explaining as follows: "The People have to prove that the crime was committed for the benefit of, at the direction or in association with a criminal street gang. So to some extent, the law permits guilt by association as proof because they don't have to show that Mr. Fernandez was an active gang member at the time, only if it was one of those three things now, that may be evidence of one of those three things, but that's not. It's true it is somewhat prejudicial to the defendant, but I don't think unduly so, and that's the statutory basis, and I think it is highly probative and also to impeach Ms. Rojas. So after weighing it under 352, I find that the probative value does outweigh any undue prejudice to the defendant, and I'm going to allow that."

B. Analysis

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "'Evidence is substantially more prejudicial than probative . . . [only] if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [citation].' (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)" (*People v. Tran* (2011) 51 Cal.4th 1040, 1047 (*Tran*).) A trial court's ruling on the admission of evidence is reviewed for abuse of discretion. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

The evidence challenged here was admitted to prove that defendant was an active participant in a criminal street gang as defined by the California Street Terrorism Enforcement and Prevention Act (the STEP Act; § 186.20 *et seq.*). The STEP Act crim-

inalizes active participation in a criminal street gang (§ 186.22, subd. (a)), defined as any ongoing association that has as one of its primary activities the commission of certain criminal offenses and engages through its members in a "pattern of criminal gang activity." (§ 186.22, subd. (f); *see Tran*, *supra*, 51 Cal.4th at p. 1044.) A pattern of criminal gang activity is "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" specified criminal offenses within a certain time frame, on separate occasions, or by two or more persons (the "predicate offenses"). (§ 186.22, subd. (e); *see Tran*, *supra*, at p. 1044.)

In *People v. Tran*, *supra*, 51 Cal.4th 1040, the California Supreme Court considered whether a predicate offense may be established by evidence of an offense committed by the defendant on a separate occasion. Although the court acknowledged that such evidence is "[w]ithout doubt . . . inherently prejudicial" (*id.* at p. 1047), it held that a predicate offense may be established by such evidence. It explained: "[B]ecause the prosecution is required to establish the defendant was an active participant in a criminal street gang and had knowledge of the gang's criminal activities, the jury inevitably and necessarily will in any event receive evidence tending to show the defendant actively supported the street gang's criminal activities. That the defendant was personally involved in some of those activities typically will not so increase the prejudicial nature of the evidence as to unfairly bias the jury against the defendant. In short, the use of evidence of a defendant's separate offense to prove a predicate offense should not generally create 'an intolerable "risk to the fairness of the proceedings

or the reliability of the outcome.'" (*People v. Waidla*, *supra*, 22 Cal.4th at p. 724.)" (*Tran*, *supra*, at p. 1048.)

The *Tran* court rejected the defendant's contention that evidence of a defendant's separate offense on another occasion should not be admitted when the prosecution has the ability to develop evidence of offenses committed on separate occasions by other gang members. "[D]efendant cites no authority for the argument that the prosecution must forgo the use of relevant, persuasive evidence to prove an element of a crime because the element might also be established through other evidence. The prejudicial effect of evidence defendant committed a separate offense may, of course, outweigh its probative value if it is merely cumulative regarding an issue not reasonably subject to dispute. [Citations.] But the prosecution cannot be compelled to '"present its case in the sanitized fashion suggested by the defense."' [Citation.] When the evidence has probative value, and the potential for prejudice resulting from its admission is within tolerable limits, it is not *unduly* prejudicial and its admission is not an abuse of discretion. Further, a rule requiring exclusion of evidence of a defendant's separate offense on the theory the prosecution might be able to produce evidence of offenses committed by other gang members would unreasonably favor defendants belonging to large gangs with a substantial history of criminality. That the prosecution might be able to develop evidence of predicate offenses committed by other gang members therefore does not require exclusion of evidence of a defendant's own separate offense to show a pattern of criminal gang activity. [Fn. omitted.]" (*Tran*, *supra*, 51 Cal.4th at pp. 1048-1049.)

In the present case, evidence of Rocco's arrest in defendant's living room was not unduly prejudicial; indeed it was substantially less so than the evidence admitted in *Tran* that the defendant *himself* had committed a prior offense for the benefit of a criminal street gang. Moreover, the evidence of Rocco's arrest in defendant's apartment was relevant to prove both that defendant was an active member of the Drifters (a fact that defendant and Rojas denied) and that the Drifters are a criminal street gang within the meaning of the statute. The trial court did not err in admitting the evidence.

III. Sufficiency of the Evidence to Support the Gang Enhancement

Defendant urges there is no evidence that he committed the robbery of which he was convicted with the "specific intent to promote, further, or assist in any criminal conduct by gang members," as section 186.22, subdivision (b)(1)(C) requires. For the following reasons, we disagree.

In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence — that is, evidence that is reasonable, credible, and of solid value — from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.) We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. (*Ibid.*) If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reason-

ably be reconciled with a contrary finding; "'[a] reviewing court neither reweighs evidence nor reevaluates a witness's credibility.'" (*Ibid.*)

California law is clear that the commission of a crime "'in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime.' (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322; *see also People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 ['very fact that defendant committed the charged crimes in association with fellow gang members' supports the enhancement].)" (*People v. Miranda* (2011) 192 Cal.App.4th 398, 412; *see also People v. Romero* (2006) 140 Cal.App.4th 15, 19-20 ["Thus, the specific intent element is satisfied if appellant had the specific intent to 'promote, further, or assist' Moreno in the shootings of Dennard and King. There was ample evidence that appellant intended to commit a crime, that he intended to help Moreno commit a crime, and that he knew Moreno was a member of his gang. This evidence creates a reasonable inference that appellant possessed the specific intent to further Moreno's criminal conduct."].)

Defendant contends that because his associates were never identified, there is no evidence he acted in concert with other gang members. We do not agree. There was extensive evidence that defendant was a member of the Drifters, including defendant's admission that he had been a member of the Drifters, the gang paraphernalia in his home, defendant's Drifters tattoos, and his residence in a Drifters stronghold. Further, there was evidence that (1) defendant immediately identified himself as a Drifters member when he approached Lopez; (2) defendant then whis-

tled for three or four other men, who assisted defendant in attacking Lopez; and (3) the other men emerged from, and then retreated to, a building on 14th Street and Magnolia, which Cirrito identified as a Drifters stronghold. Although defendant theoretically could have planned a street crime with individuals who were not members of his gang, if he had done so it is extremely unlikely that he would have identified the Drifters immediately before committing the crime or made use of a Drifters stronghold immediately afterwards. Thus, although the other men who helped defendant rob Lopez were not identified, the evidence was sufficient to permit the jury to infer that defendant's confederates were fellow gang members.

Further, even without evidence that defendant robbed Lopez in concert with other Drifters members, the evidence still would have been sufficient to support the jury's finding that defendant had the specific intent to further criminal conduct by Drifters members. Cirrito testified that a gang benefits when members openly commit crimes within the gang's territory because "[t]hey put fear in the neighborhood. People are afraid to come forth and talk about the crimes." Based on this testimony, the jury properly could infer that defendant intended to benefit the Drifters and its members in precisely this manner when he robbed Lopez in the middle of the day on a well-traveled street. The inference is strengthened by the fact that defendant identified himself as a member of the Drifters immediately before robbing Lopez; indeed, it is difficult to imagine that defendant would have identified himself as a Drifters member for any reason *other than* to benefit the gang and the criminal conduct of its members. (*See In re Cesar V.* (2011) 192 Cal.App.4th 989, 1000

["There was no reason for Cesar and Antonio to make a gang challenge except to promote further criminal activity by Poor Side Chicos gang members."]; *People v. Margarejo* (2008) 162 Cal.App.4th 102, 109-110 (*Margarejo*) ["It is remarkable for a person in a high-speed chase to make gang signs to pedestrians and *to the police*. Why bother with this effort to communicate? It cannot aid the ordinary goal of an attempted escape, which is to escape. Without objection, an officer testified Margarejo's signing was to 'intimidate the community, intimidate us.'"].)

Although we "cannot look into people's minds directly to see their purposes," we "can discover mental state . . . from how people act and what they say." (*Margarejo*, *supra*, 162 Cal.App.4th at p. 110.) Here, defendant "acted like he wanted to help his gang": He repeatedly announced his gang's dominance while committing a violent crime in broad daylight. (*Ibid.*) As in *Margarejo*, "[t]he message he broadcast — the *only* message he broadcast — was the gang message. The logical purpose was to accomplish the foreseeable effect: to proclaim the gang's dominance[.]" (*Ibid.*) Thus, the jury could reasonably conclude defendant had "the specific intent to . . . assist [other] criminal conduct by gang members." (§ 186.22, subd. (b)(1).)

IV. *Pitchess* Motion*

Defendant contends that the trial court erred by denying his motion for discovery under *Pitchess*, *supra*, 11 Cal.3d 531. He contends that the motion clearly articulated the grounds on which the discovery was being sought and set forth a logical connection between the proposed defense and charges, as

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* *See* footnote, *ante*, page 100.

required by Evidence Code section 1043. For the following reasons, we agree in part.

A. Facts

Officer Cirrito filed a police report following defendant's arrest. As relevant to the *Pitchess* motion, it stated that on October 12, 2009, Officers Corona, Clark, and Cirrito conducted a domestic violence investigation at 2223 West 15th St. They were met at the door by "Roxann R." (Roxanne Rojas), who stated she was in the house with her children. She had redness and swelling on the bridge of her nose and forehead, and blood smeared on her shirt and right wrist. Cirrito questioned her about her injuries and she "replied [that] she got into a fight." Cirrito interviewed Rojas again after defendant was arrested and removed from the scene. According to the police report, she told Cirrito as follows: "Roxann R. stated she was upset at [defendant] because she observed him talking to another girl, Vanessa, earlier. Roxann R[.] stated she got into a confrontation with Vanessa and was very upset. Roxann R. confronted [defendant] in the apartment. Both [defendant] and Roxann R. got into a verbal confrontation over the other girl, Vanessa. [Defendant] became enraged and struck Roxann R. on the face causing swelling and bruising to her nose, forehead, left eye and left temple area. Roxann R. stated [defendant] struck her once and then walked away into another room." According to the police report, Detective Clark also interviewed Rojas's son, Christian, who said that defendant "hit his mom and made her cry and bleed."

Defendant filed a motion for pretrial discovery. The motion sought evidence of "[a]ll complaints from any and all sources relating to acts of violation of constitutional rights, fabrication of charges, fabrication of

evidence, fabrication of reasonable suspicion and/or probable cause, illegal search/seizure[,] false arrest, perjury, dishonesty, writing of false police reports, writing of false police reports to cover up the use of excessive force, planting of evidence, false or misleading internal reports including but not limited to false overtime or medical reports, and any other evidence of misconduct amounting to moral turpitude within the meaning of *People v. Wheeler* (1992) 4 Cal.4th 284" against Officers Clark, Cirrito, and Corona. In support, defense counsel declared that according to police reports, "Roxann R." (Roxanne Rojas) told officers that defendant had struck her in the face, but "[b]ased upon information and belief, Roxann R. never told the officers that she had been struck by [defendant]. Rather, after they came to her door and knocked for her to open the door, she told them repeatedly that her injuries had been caused by a fight she had gotten into earlier that morning with a girl named Vanessa. She got into a confrontation with Vanessa at the apartment complex and entered into a physical fight with her. She was then arguing verbally with [defendant] about his relationship with Vanessa before the officers came to the door, but no blows were exchanged between her and [defendant] at any time."

The court denied the *Pitchess* motion, stating that it did not believe it plausible that officers lied about what Rojas told them because "[defendant's] son also said that [defendant] struck his mother, and that's in the police reports."

B. Analysis

In *Pitchess*, *supra*, 11 Cal.3d 531, the California Supreme Court held that a criminal defendant may

in some circumstances compel the discovery of evidence in a law enforcement officer's personnel file. In 1978, the California Legislature codified the procedures surrounding so-called "*Pitchess* motions" through the enactment of sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045. (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 69 (*Garcia*).) A trial court has broad discretion in ruling on a *Pitchess* motion, and we review the court's decision for abuse of discretion. (*Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1086; *People v. Hughes* (2002) 27 Cal.4th 287, 329.)

To obtain *Pitchess* information, the defendant must file a written motion. (Evid. Code, § 1043, subd. (a).) The motion "must describe 'the type of records or information sought' and include '[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.' [Fn. omitted.] (§ 1043, subd. (b)(2), (3).)[9] This

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[9] Evidence Code section 1043 provides: "(a) In any case in which discovery or disclosure is sought of peace or custodial officer personnel records or records maintained pursuant to Section 832.5 of the Penal Code or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records. The written notice shall be given at the times prescribed by subdivision (b) of Section 1005 of the Code of Civil Procedure. Upon receipt of the notice the governmental agency served shall immediately notify the individual whose records are sought.

"(b) The motion shall include all of the following:

good cause showing is a 'relatively low threshold for discovery.' [Citation.] Assertions in the affidavits 'may be on information and belief and need not be based on personal knowledge [citation], but the information sought must be requested with sufficient specificity to preclude the possibility of a defendant's simply casting about for any helpful information.' [Citation.] If the defendant establishes good cause, the court must review the records in camera to determine what, if any, information should be disclosed. (*Ibid.*; § 1045, subd. (b).)" (*Garcia*, *supra*, 42 Cal.4th at pp. 70-71.)

In *Warrick v. Superior Court* (2005) 35 Cal.4th 1011 (*Warrick*), our Supreme Court described the necessary evidentiary support for a *Pitchess* motion as follows: "The supporting affidavit 'must propose a

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"(1) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace or custodial officer whose records are sought, the governmental agency which has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard.

"(2) A description of the type of records or information sought.

"(3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.

"(c) No hearing upon a motion for discovery or disclosure shall be held without full compliance with the notice provisions of this section except upon a showing by the moving party of good cause for noncompliance, or upon a waiver of the hearing by the governmental agency identified as having the records."

defense or defenses to the pending charges.' (*Id.* at p. 1024.) To show the requested information is material, a defendant is required to 'establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events.' (*Id.* at p. 1021.) The information sought must be described with some specificity to ensure that the defendant's request is 'limited to instances of officer misconduct related to the misconduct asserted by the defendant.' (*Ibid.*)

> "Counsel's affidavit must also describe a factual scenario that would support a defense claim of officer misconduct. (*Warrick*, *supra*, 35 Cal.4th at pp. 1024-1025.) 'That factual scenario, depending on the circumstances of the case, may consist of a denial of the facts asserted in the police report.' (*Ibid.*) 'In other cases, the trial court hearing a *Pitchess* motion will have before it defense counsel's affidavit, and in addition a police report, witness statements, or other pertinent documents. The court then determines whether defendant's averments, "[v]iewed in conjunction with the police reports" and any other documents, suffice to "establish a plausible factual foundation" for the alleged officer misconduct and to "articulate a valid theory as to how the information sought might be admissible" at trial.' (*Id.* at p. 1025.) Corroboration of or motivation for alleged officer misconduct is not required. (*Ibid.*) Rather, 'a plausible scenario of officer misconduct is one that might or could have occurred.' (*Id.* at p. 1026.) A scenario is plausible when it asserts specific misconduct that is both internally consistent and supports the proposed defense. (*Ibid.*) 'A defendant must also show how

> the information sought could lead to or be evidence potentially admissible at trial.' (*Ibid.*) A defendant who meets this burden has demonstrated the materiality requirement of section 1043. (*Warrick*, at p. 1026.)" (*Garcia*, *supra*, 42 Cal.4th at p. 71.)

In the present case, there is a logical link between the crime charged (corporal injury to a spouse, cohabitant, or child's parent) and the proposed defense. The police report authored by Officer Cirrito says that immediately after the officers arrested defendant, Rojas told Cirrito that defendant hit her in the face. According to defense counsel's declaration, however, Rojas never told the officers that defendant hit her; instead, she said repeatedly that her injuries resulted from a fight she had gotten into earlier that morning with Vanessa. Rojas's statement to the police about who caused her injury plainly is relevant, and any evidence that Cirrito previously had falsified a police report would tend to undermine Cirrito's testimony that Rojas initially blamed defendant for her injuries. Consequently, counsel's declaration was sufficient to require the trial court to conduct an in camera review of Cirrito's personnel file. The declaration was not sufficient to require the trial court to conduct an in camera review of the personnel files of Clark and Corona, however, as neither officer authored the police report or was the apparent source of any statements in Cirrito's report about who Rojas blamed for her injuries.

The Attorney General contends that the trial court was within its discretion in finding that the allegation that Cirrito fabricated Rojas's statements was "implausible" in light of what Rojas's son indisputably told the police. We do not agree. The *Pitchess*

threshold is "relatively low": A defendant must show a scenario of officer misconduct "might" or "could have" occurred, but need not show that such a scenario is "credible" or "believable." (*Warrick*, *supra*, 35 Cal.4th at p. 1026.) As the Supreme Court explained in *Warrick*, to require a criminal defendant to present a "credible" or "believable" factual account of police misconduct "suggests that the trial court's task in assessing a *Pitchess* motion is to weigh or assess the evidence. It is not. . . . The trial court does not determine whether a defendant's version of events, with or without corroborating collateral evidence, is persuasive — a task that in many cases would be tantamount to determining whether the defendant is probably innocent or probably guilty." (*Ibid.*) The trial court therefore erred in failing to conduct an in camera review of Officer Cirrito's personnel files based on the asserted "implausibility" of counsel's representation.

The remedy for a failure to conduct an in camera review of an officer's personnel records was established by the Supreme Court in *People v. Gaines* (2009) 46 Cal.4th 172 (*Gaines*). There, the court said that the proper remedy when a trial court has erroneously rejected a showing of good cause for *Pitchess* discovery and has not reviewed the requested records in camera "is not outright reversal, but a conditional reversal with directions to review the requested documents in chambers on remand." (*Id.* at p. 180.) After reviewing the confidential materials in chambers, the trial court may determine that the requested personnel records contain no relevant information; if so, it should reinstate the judgment. If the trial court determines on remand that relevant information exists and should be disclosed, the trial court "'must order disclosure, allow [defendant] an

opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed.'" (*Id.* at p. 181.)

In the present case, we conditionally reverse only count 2 (corporal injury on a spouse, cohabitant, or child's parent), because that is the sole count to which the declaration submitted in support of the *Pitchess* motion is relevant. On remand, the trial court shall review the relevant portions of Officer Cirrito's personnel records in chambers. If it determines after doing so that the records contain no relevant information, it shall reinstate the judgment as to count 2. (*Gaines*, *supra*, 46 Cal.4th at p. 181.) If the court's review reveals relevant information, it shall disclose that information to defendant and give him a reasonable opportunity to investigate. The court shall order a new trial only if defendant demonstrates a reasonable probability of a different outcome had the evidence been disclosed; if not, it shall reinstate the judgment. (*Ibid.*)

DISPOSITION

The conviction on count 2, willful infliction of corporal injury on a spouse, cohabitant, or child's parent, is conditionally reversed, with directions to the trial court to review relevant portions of Officer Cirrito's personnel records in chambers. If the trial court determines that the records contain no relevant information, it shall reinstate the judgment as to count 2. If it determines that the records contain some relevant. information, it shall give defendant, a reasonable opportunity to investigate the disclosed material and order a new trial if he demonstrates a reasonable probability of a different outcome had the

evidence been disclosed; otherwise, the court shall reinstate the judgment as to count 2. In all other respects, the judgment is affirmed.

Epstein, P. J., and, Willhite, J., concurred.

IN THE SUPREME COURT OF CALIFORNIA
En Banc

[Filed October 31, 2012]

S205218

THE PEOPLE,
Plaintiff and Respondent,

v.

WALTER FERNANDEZ,
Defendant and Appellant.

Court of Appeal,
Second Appellate District,
Division Four - No. B232277

The petition for review is denied.

Cantil-Sakauye
Chief Justice

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Case No. BA363324-01

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

WALTER FERNANDEZ-01,

Defendant.

Department Central 130
Hon. William C. Ryan, Judge

REPORTER'S TRANSCRIPT OF PROCEEDINGS
WEDNESDAY, MARCH 3, 2010; MAY 17, 2010;
JUNE 4, 2010

Appearances:

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[B-1] CASE NUMBER:	BA363324
CASE NAME	PEOPLE VS. WALTER A. FERNANDEZ
LOS ANGELES, CA.	MONDAY, MAY 17, 2010
DEPARTMENT C-130	HON. WILLIAM C. RYAN, JUDGE
REPORTER:	RONALD KIM, CSR NO. 12299

APPEARANCES: THE DEFENDANT BEING PRESENT WITH COUNSEL, MATTHEW ROWAN, DEPUTY PUBLIC DEFENDER; EMILY ALLARDYCE, DEPUTY DISTRICT ATTORNEY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA.

THE COURT: People versus Walter Fernandez, BA363324.

MR. ROWAN: Matthew Rowan, deputy public defender, on behalf of Mr. Fernandez.

MS. ALLARDYCE: Emily Allardyce on behalf of the People.

THE COURT: This is here on a 1538.5 motion.

MR. ROWAN: Yes, Your Honor.

THE COURT: What's being challenged here?

MR. ROWAN: The search and subsequent detention.

THE COURT: Well, which?

MR. ROWAN: Well, both. What happened is that Mr. Fernandez was – his apartment was entered. He was taken, I believe, to another location for a field

showup, and there was a search done of the apartment.

THE COURT: Do you agree, Ms. Allardyce, the search was without a warrant?

MS. ALLARDYCE: Yes, Your Honor.

[B-2] THE COURT: Okay. The burden shifts to the People to show the lawfulness of the search. You can call your first witness.

MS. ALLARDYCE: Thank you. The People call Officer Cirrito.

THE COURT: Okay.

JOSEPH CIRRITO,

called as a witness by the People, was sworn and testified as follows:

MS. ALLARDYCE: Present next to me, Your Honor, I have the investigating officer, Detective Clark. I don't anticipate that she'll be testifying.

THE COURT: Okay.

THE CLERK: Do you solemnly state that the testimony you are about to give in the cause now pending before this court shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE DEFENDANT: Yes, ma'am.

THE CLERK: Please have a seat.

Please state both your names, and spell it for the record.

THE DEFENDANT: My first name is Joseph, J-o-s-e-p-h; last name is C-i-r-r-i-t-o.

THE COURT: Ms. Allardyce.

MS. ALLARDYCE: Thank you.

[B-3] DIRECT EXAMINATION

BY MS. ALLARDYCE:

Q What is your occupation and assignment?

A Ma'am, I'm a Los Angeles police officer for the City of Los Angeles.

Q And where are you assigned?

A I'm presently assigned to Olympic Gang Enforcement Detail.

Thank you. I want to draw your attention back to the date of October 12, 2009, at approximately 12:15 p.m. Do you remember the date and time that I'm speaking about?

A Yes, ma'am.

Q On that date and at that time did you respond to the location of Venice Boulevard and Magnolia Avenue, here in the City and County of Los Angeles in response to an A.D.W. in progress radio call?

A Yes. I responded to that radio call.

Q Okay. And once you arrived at that location – actually, strike that. The radio call that you received, did that call describe any suspects that you were looking for?

A Yes. At that point, when I heard the radio call coming out, I was on Vermont, just probably south of Wilshire. I heard the comments of that call come out. I was with my partner, Detective Clark, at the time. I decided to drive to a known location where the suspects possibly might arrive.

[B-4] Q When you say –

MR. ROWAN: Your Honor – excuse me – I'm going to object to Detective Clark being present in the court room. I wasn't aware that she was actually present at the time this all occurred. So given that she's a percipient –

THE COURT: Ms. Allardyce has represented she's not going to be a witness.

MS. ALLARDYCE: Not for today's proceedings. I mean, in trial.

THE COURT: Yeah, but not for today.

MR. ROWAN: The defense may wish to call her – I don't know, but since she's actually someone that was percipient, she was there at the time.

THE COURT: But she's not a witness.

MR. ROWAN: She may become a witness.

THE COURT: Not a witness for the People.

Go ahead.

Q (By Ms. Allardyce) You said a known location where a suspect might hang out. What do you mean by that?

A Yes, ma'am. It's a known gang location for the Drifters. Due to the comments of the call, where the incident occurred on Magnolia and Venice, the comments of the calls brought up that it was possible Drifter gang members that were involved, and, specifically, it described one of the suspects with a tattoo of "L.A." on the top of his head.

Q Okay. Officer Cirrito, are you in any way [B-5] familiar with the Drifters dang?

A Yes, I am.

Q How are you familiar with that gang?

A That's one of the gangs I monitor in Olympic Division.

Q Once you went to that location – is that actually at Venice and Magnolia, the known location?

A No, ma'am.

Q Where is that?

A We drove directly to the rear alley. That would be between 14th Street and 15th Street. You have Magnolia to the east, and you have Orchard to the west, and there's a rear alley between 14th and 15th.

Q Okay. What did you do at that alley?

A At that point, my partner and I parked a vehicle, and I began to walk around that area checking some of the known locations.

Q When you say you parked the vehicle, was that a marked black and white police vehicle?

A No, ma'am. It was a dual purpose vehicle. It looks like a regular car.

Q How were you clothed at that time?

A I was dressed – at this particular day, that particular month, I was alone with the Olympic gang detectives so I was wearing a blue police raid jacket.

Q What did you do in order to locate any potential suspects at that location?

A Just at that point, because of what – the [B-6] comments of the call that I heard, I was just looking for anyone that might fit that description, might be coming back to that location.

Q What happened next?

A As we were just checking the surrounding area, I observed a male dressed with a light blue t-shirt, like grayish tanish khaki pants, run across the alleyway from the north side to the south side to a known location that I'm familiar with.

Q After you saw this individual, what did you do?

A I then went – I moved to a better position. I got in touch with the primary unit to ask for more descriptions of the suspects and how many suspects –

Q Okay.

A – and that – letting them know where I was at at that point and that I might have possible suspects.

Q Okay. What type of crime were you there to investigate?

A At first, it was – the radio call came out as A.D.W. It was later it would be reclassified as a robbery.

Q Okay. And the victim of the robbery, was that individual present at that time as well?

A He was present at the location on Venice and Magnolia.

[B-7] Q Okay. Approximately how far away from Venice and Magnolia were you at that time?

A It's probably within a quarter of a mile or so, pretty close by.

Q The individual, the male that you observed, did he in any way match the descriptions of the radio call?

A There was some possible matches, but again, I was calling, talking to the primary unit to get some more specifics to talk to the victim on the clothing.

Q Okay. What happened next?

A When I repositioned myself to the location where I saw the suspect enter, I began to hear yelling from the second floor.

Q The person that you are describing as the suspect, is that the individual with the male that you saw crossing the street?

A I'm sorry, ma'am?

THE COURT: Crossing the alley.

Q (By Ms. Allardyce) Crossing the alley.

I'm sorry. Thank you.

A At this point, all I see is a person crossing the alley, entering this location.

Q Right.

A At this point that's all I got.

Q Okay. You say that he entered into a building?

A Yeah. He entered a house, which I know is [B-8] a known gang location.

Q And what is the address of that location?

A 2223 Southwest 15th Street.

Q Shortly after this individual entered the residence, did you hear something that –

THE COURT: 2223 West. 15th Street?

THE DEFENDANT: Yes, sir.

THE COURT: You said south at one point.

THE DEFENDANT: Sorry, sir. It's west 15th.

THE COURT: 15th runs east-west; correct?

THE DEFENDANT: Yes, sir.

THE COURT: Go ahead.

Q (By Ms. Allardyce) Shortly after this individual. entered that residence, did you hear something that caught your attention?

A Yeah. I began to hear yelling and screaming coming from that location.

Q Okay. This location, is that a single family home or an apartment?

A It's a multi-apartment home. It's a home that has been restructured into separate apartments inside.

Q Okay. The unit that you observed this individual walk into, was that on the ground floor or on the second floor?

A It was the second floor.

Q Okay. After you heard the sound of yelling, what did you do?

[B-9] A At that point, I got on the radio, and I requested additional units to come to my location.

Q What happened next?

A I waited for those additional units to arrive and then let them know what I had, and we walked up the back staircase, the rear of the location, and we knocked on the door.

Q And when you knocked on the door, what happened?

A At that time a female approximately in her 20's answered the door. She was holding an infant.

Q Was there anything with her appearance that caught your attention?

A Well, right away, she was out of breath. She seemed upset, and also, physically, I observed swelling. It was like swelling as I was talking to her, her forehead from the bridge of her nose. She had blood on her blouse, the white shirt, and I saw blood also smeared on one of her hands. I believe it was her right hand.

Q Did those injuries and the blood that you observed, did that appear to be fresh, or was it dried blood?

A No. At the point, it seemed to be fresh, and that swelling on her head was – like I said, it was swelling as I was talking to her.

Q Okay. And the location where she answered the door, is that the same area that you heard the [B-10] fighting and arguing previously?

A Yes. That was the first place I went to.

Q Okay. What happened next?

A At that point, I was with also one of the additional units, Detective Corona. Detective Clark was there. Officer Aguilar and Officer Pagallo was there.

Q Okay. What did you do?

A At that time, I told the female, I asked her what happened, "Why is there blood on your shirt and swelling?" I also let her know that I heard yelling coming from there and was there anybody else in the location.

Q What happened next?

A She responded –

MR. ROWAN: Objection. Hearsay.

THE COURT: Sustained.

Q (By Ms. Allardyce) Did you at any point during this conversation with this female observe anyone who is present in court today?

A Yes.

Q Okay. And can you identify where that person is located and what that person is wearing presently.

A Yes. He's to the far left, and he's wearing a blue jumpsuit.

THE COURT: Okay. Indicating the defendant.

Q (By Ms. Allardyce) Tell me how you observed the defendant.

[B-11] A As I was talking and Detective Corona was talking to the female, asking her to step outside, Mr. Fernandez approached. He came through the kitchen and approached us.

Q How would you describe his demeanor?

A At this point, he's just wearing boxer shorts. He's kind of all sweaty, real angry. I asked him to step outside. I wanted to talk about what was occurring. He yelled at me, "Get out. I know my rights. You can't come in."

Q Okay. What was the purpose of you asking him to step outside?

A From my training and experience, I thought at this point, that it was some sort of a battery that took place. I wanted to separate the female and him. I

didn't – I also don't know what else is inside, what's going on.

Due to his appearance and the way he was acting, I wanted to have him step outside and move him away from the scene.

Q At that point, Officer, were you able to notice whether or not the defendant, Mr. Fernandez, matched any of the descriptions previously given in response to the 211?

A At the point, when we did detain Mr. Fernandez for the investigation for this battery or possible domestic violence, I had him step downstairs the same we entered because the female was upstairs, have him [B-12] come downstairs. As he's walking downstairs, I noticed the tattoo on the top of his head.

Q And what about that tattoo was significant to you?

A Due to the comments of the call, it said it was an L.A. with like the logo of L.A. on the top of the suspect's head.

Q What does the defendant have on his head?

A He has – it's an interesting tattoo. He has what would be a W-A. It's two L's in reverse, and it forms a "W" with the "A."

Q Okay. Prior to taking the defendant downstairs, were you actually in the apartment at this time, or were you still outside by the door?

A At this point I'm going downstairs. I'm following the officers, and I'm going down the stairs to deal with – I'm getting in touch with the primary unit to do a field showup –

Q Okay.

A – for the robbery investigation, but at that time we thought it was an A.D.W. investigation.

Q And you were going to have the defendant participate in that field showup?

A Yes.

Q And was he ultimately identified in that field showup?

A Yes.

Q By the victim?

[B-13] A Yes.

MR. ROWAN: Objection, hearsay.

THE COURT: Overruled.

Q (By Ms. Allardyce) Tell me about the apartment. After – or when did you search the apartment? When did that happen?

A After we were advised by or were informed by the victim of the robbery, that's when we then went to check the location for possible evidence, and that's when my partner got a consent to search form filled and signed.

Q And the consent to search form was signed by whom?

A By the female that was at the door, and her name was Roxanne R.

Q And at that point did she appear to be an individual who was residing at that location?

A She stated that she lived there with her boyfriend, Mr. Fernandez and her children.

Q The consent to search itself was signed off by her; is that correct?

A Yes.

MS. ALLARDYCE: Okay. And I would ask to mark that as People's 1 for identification.

THE COURT: Okay.

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[B-14] (Marked for Identification,
People's Exhibit No. 1,
Consent to Search Form.)

MR. ROWAN: Objection. I'm going to object to that on hearsay grounds, Your Honor.

THE COURT: Overruled.

MS. ALLARDYCE: May I approach, Your Honor?

THE COURT: Yes.

Q (By Ms. Allardyce) Officer, looking at People's 1, which appears to be an L.A.P.D. Consent to Search Form, do you recognize this?

A Yes, I do.

Q How do you recognize this?

A I recognize the form. I recognize the premise, the person who signed it and Detective Clark who gave the order.

Q Okay. And the premise that has been consented to being searched is –

A 223 West 15th Street.

Q And that's the apartment that you indicated you observed the defendant in; is that correct?

A Yes.

Q And that's the apartment that was ultimately searched?

A Yes.

Q Anything recovered from this apartment?

A We recovered some clothing articles that [B-15] might have been used in the incident, the robbery incident. We recovered a pocket – a folding knife that may have been used as the weapon during that incident. We also recovered a shotgun, sawed-off, that was inside the home.

MS. ALLARDYCE: Nothing further.

THE COURT: Mr. Rowan?

CROSS-EXAMINATION

BY MR. ROWAN:

Q Good morning officer.

A Good morning, sir.

Q So when you got this radio call, you were – what time was that?

A Well, according to the comments of the call, the radio call came out, I believe, approximately 12:15.

Q Okay. And were you responding immediately to the call, or did you find out about it sometime later?

A No. I heard it come over the radio when I was in my vehicle, and I went towards that location.

Q Okay. So it was 12:15 when you got the call?

A That's when the call was broadcasted on the radio.

THE COURT: I don't think it was broadcasted directly to him, Mr. Rowan. He just overhead.

MR. ROWAN: I understand that.

[B-16] Q I'm talking about when you –

THE COURT: You responded to it. Mr. Rowan: – you heard the call.

THE COURT: Basically, you responded as soon as you heard it?

THE DEFENDANT: Yes, sir. We were –

THE COURT: You were not engaged in another call?

THE DEFENDANT: No, sir.

Q (By Mr. Rowan) Okay. And you said that you responded immediately to this area by the alley?

A Yes. That's the – I didn't go to – directly to the incident, but there was already units going to that – where the incident, Magnolia and Venice. Due to my experience in working that area, I went to a location where I thought suspects would run to.

Q Okay. And where were you when you got the call?

A Again, I was on Vermont, and I was probably just southbound Wilshire.

Q Okay. And how long did this take you to get to this alleyway where you observed this person?

A Approximately 15 minutes maybe. Again, I'm not going to Code 3 or anything. I have to abide by the rules to get there. I was in a dual purpose car, not a police car.

Q So you weren't running your sirens. You were just driving normally?

A I was – it wasn't my call. I'm going as [B-17] an additional unit and to assist.

Q Okay.

THE COURT: So they don't ordinarily go lights and sirens?

THE DEFENDANT: No, sir, especially not a dual purpose vehicle.

THE COURT: Okay.

(By Mr. Rowan) Okay. And you said this location's about a quarter mile from the actual incident location of Magnolia.

A I would say an approximate, sir, but don't quote me. It could be a half a mile. It could be a quarter mile. It could be less than a quarter mile, but it isn't too far.

Q Okay. And you said that the description that came out over the radio included that there was an L.A. tattoo on the person's head?

A Yes. One of the comments that – there was several comments of the call. It described one of the suspects being light-skinned, tall. One of the comments brought up about an L.A. tattoo on his head.

Q Okay. I'm just trying to focus in.

A Sure.

Q Was there like a clothing description, or was it only the L.A.?

A There was – honestly, there were – through the comments and looking at the comments, there was several different descriptions of the suspects – [B-18] gray clothing, black sweatshirt. So there was different descriptions of multiple – and there was multiple suspects.

Q Okay. And this person you said you saw was running across the alleyway?

A Yes. I saw an individual running across the alleyway. It appeared that that individual did not see me or my partner, and at that point, I don't know what I have. I just have someone that's running across 0 that's entering into a location, that knows the gang location.

Q And this location is essentially an apartment building; correct?

A Well, it's a house, but it has –

THE COURT: Houses converted to apartments?

THE DEFENDANT: Yes, sir.

Q (By Mr. Rowan) And where did you specifically see this person go that ran across the alley?

A I saw him running into the house and up the stairs where I positioned myself.

Q Okay. So you were not able to see which apartment they actually went into?

A He appeared, from where I was, that he went up the second floor, and he went to the – it would be to the right apartment. There's two apartments upstairs.

Q Okay. And so you're – I mean, I'm just trying to get an actual visual of what you're seeing. Is there an exterior stairway, or what are you able to see?

[B-19] A Yes. There's an exterior stairway to the rear, to the rear of that location that runs to the upstairs.

Q Okay. All right. And you were in your patrol car or your multi-purpose –

A I wasn't – at this point, as I've stated before, when I'm – even when I'm on detail, I don't stay in my car. We move around. I walk.

I know certain locations to go to. So I'm looking at those places, looking at the separate locations in that particular area.

Q So you're on foot at this point?

A Yeah. I was on foot. All I did was get in my car, got me to the spot, got out of the car, and I started just checking the surrounding area.

Q Okay. And where exactly were you standing when you saw this person go into the apartment building?

A I was in an alleyway, that rear alleyway by that particular house and by another location to the north.

Q Okay. Were you on the same side of the street as the apartment building from across the street?

A I was in the alleyway between – the house is on West 15th. I was in that rear alleyway. So I saw him run across the alleyway into that location.

I then repositioned myself because I'm on foot, and then I stayed there, and I was at this point getting in touch with the primary unit to get a suspect [B-20]

description. So, now, I have eyes on that particular house where he entered, and I was watching the back of the house.

Q Okay. And you said that you – at some point you heard yelling coming from inside the building?

A It wasn't at that point. I began to hear yelling and screaming, which was a little out of the ordinary because it was very loud, and it caught my attention.

Q Okay. Well, what point exactly was it that you heard the yelling?

A When – after I saw the individual enter the location, I then – now, I'm standing there. I'm broadcasting. I'm talking to the primary unit. I'm letting them know what I saw and where I'm at so that they're aware of where I'm at shortly.

After that – I can't really give you a timeframe, but I'm just watching the place. I hear yelling and screaming.

Now, at this point, I don't know if it's related to that incident or now – because I'm in the City of L.A., I have a separate incident that's occurring in front of me. That's when I requested over the air for additional units because of what I'm now hearing.

Q Okay. Well –

THE COURT: Mr. Rowan, is this a convenient place to take the noon recess?

MR. ROWAN: Sure.

[B-21] THE COURT: Do you have much more?

MR. ROWAN: A little bit more, not a lot.

THE COURT: Five minutes?

MR. ROWAN: Well, more than five minutes.

THE COURT: We'll pick it up at 1:30. Can we do that?

MS. ALLARDYCE: That's fine.

THE COURT: We'll get it finished today. I'm sorry. There was a long calendar this morning. It took a long time to get started. We'll pick it up at 1:30.

(The noon recess was taken.)

THE COURT: We're in session again on People versus Walter Fernandez, BA336324. Mr. Fernandez is present in custody. The People are represented by Ms. Allardyce.

Officer, you understand you're still under oath?

THE WITNESS: Yes, sir.

THE COURT: Okay. Mr. Rowan?

Q (By Mr. Rowan) I just want to clarify. When you said that you – the first thing that you saw in the alleyway was someone running into this apartment building; correct?

A Yes, sir.

Q And you couldn't see – you didn't actually see him entering a particular apartment. You just saw [B-22] him go into the –

A Sir, I moved – as he's running that way, I repositioned myself, my partner repositioned himself, and we saw the individual run up to the second floor to the right apartment.

Q Okay. You didn't actually see them enter though?

A I saw an individual run into that apartment.

Q Okay. And is that the same apartment that you then went to later where you heard the yelling and screaming?

A That was the apartment. After that, my partner and I set up in the rear of that location, and then we were staying – we were just watching it to see if anybody else was going to come to see what's going on. I do that regularly as part of my gang assignment, in my detail. I walk through alleyways, and that's what I do.

We were holding off – moments later, that's when I heard the yelling and screaming coming from that apartment. And let me also clarify that at that time I'm not thinking about the incident. I'm thinking that an incident is occurring right now in front of me and my partner.

Q Okay. You're not thinking about this A.D.W. or whatever it was, the radio call, you're just thinking about the yelling and screaming that you're hearing?

[B-23] A At this point, sir, I hear yelling and screaming coming from there. I'm not directly involved with the other – the other – the primary unit that's over on Venice and Magnolia. So I don't know if I have a crime that's happening right in front of me.

Q Okay. So you – from the time that you made that observation of the person running into the apartment building to where you knocked on the door, how much time had passed by?

A I can't really estimate. I, again, requested for additional units because at this point I'm just with my partner. We have rain jackets on. I want to have other officers there at this point. So from the time

that they arrived, then I let them know what we had, and then we walked up, and I knocked on the door with Detective Corona, Detective Clark, Officer Pagallo and Officer Aguilar.

Q Okay. And how much time did it take for them to arrive to where you knocked on the door?

A I would say within 30 minutes, and it's probably shorter than that, but I'm not sure. I wasn't looking at my watch at the point.

Q Okay. And you said that, after you observed this female, that Mr. Fernandez came to the door?

A I was talking with the female. The female also was a little uncooperative at the time, but due to her physical injuries and everything and the yelling and [B-24] screaming –

Q I'm just asking you to answer my question please. Did Mr. Fernandez come to the door at this point?

A He entered through the kitchen, and then I observed him through the back door. So he was entering, and he was coming towards us.

Q So you were still inside of the apartment?

A He was coming from the apartment into the kitchen area to the rear door, and at that point, he's now yelling, "What are you doing? What are you doing here," and "I know my rights. You can't come in."

Q Okay. All right. And that's the point where he was wearing boxer shorts?

A Yes.

Q And anything else?

A Just boxer shorts.

Q Okay. And you said that you then ordered him out of the apartment?

A I didn't order. I asked him to step out so we can go on with this investigation.

Q You asked him to step out?

A I said, "Can you step out."

Q All right. What was his response?

A "I know my constitutional rights. You can't come in."

Q Okay.

A And that's what I remember. It's one of [B-25] the phrases he said.

Q So you then told him to come outside?

A Yes. I asked him to step out.

Q And what exact words did you use?

A I don't remember.

Q But – so you told him to come outside, and then you said you took him downstairs?

A Yeah. At that point he didn't step out. We – my – Detective Corona and I placed hands on him, on his arms to hold him. He was a little – again, yelling, "You can't do this," but we – for the reasons what I saw, due to her injuries, the yelling, I felt I had a right to be there and investigate.

Q So you took him outside, and you put handcuffs on him?

A Yes. He was handcuffed as we were walking down. Yes.

Q Okay. And you said that you conducted a field showup. Where was that conducted?

A That was right in the back in that rear alley. We had the primary unit escort the victim in the primary units vehicle, and it was in that alleyway. So it's been a while, sir, but as I remember, there's a north-south alley between 14th and 15th, and there's – it's just west of Magnolia.

I believe it was there in this driveway. I can't remember if the car was parked in the driveway or if it was the alleyway. I'm pretty sure it was the [B-26] alleyway, and he was in – he was in the east-west alley. It's like a "T" that ends up there.

It's like a capital "T," and he was at that "T," and we just pulled the car where the victim could observe the possible suspect, and it's a normal thing to do a field showup.

Q And the location where Mr. Fernandez was, you said it was at the "T" of this alleyway. How far is that from his apartment?

A Maybe 60 feet. It was where our patrol car was. We had him by that.

Q And how long did it take before the witness came to identify him?

A I can't give you an exact time, pretty quickly. I mean, he wasn't – it wasn't long. He wasn't waiting long, but I'm not sure exactly how long.

Q Well, was it half an hour?

A No, less than a half an hour.

Q 15 minutes?

A Maybe around 15 minutes, 10, 15 minutes.

Q Okay. And how – was he still in boxer shorts at this point or?

A I believe so.

Q Okay. And so you mentioned that the female that was at the door, that she had some swelling?

A She had swelling on the bridge of her nose, and she had swelling on the top of the head, and I gave photographs of that.

[B-27] Q Okay. And do you have those photographs with you?

A You should have a copy of those photographs, and I know that D.A. Allardyce has it. I gave it – you were given everything on the prelim.

Q That's the picture where you can see her face, the bridge of her nose, the forehead. And (unintelligible) –

THE COURT REPORTER: And the what?

THE WITNESS: You could see the swelling –

THE COURT: No, no, no. He wanted you to repeat what you said. He said, "You have them in your right hand."

MR. ROWAN: Okay.

(Marked for Identification,
Defense Exhibits Nos. A through C, Photographs.)

Q (By Mr. Rowan) Showing you what I've marked for identification as Defense A through C –

A Yes, sir.

Q – do you recognize what these are?

A Yes. These are the photographs of the female.

Q Okay. And were those taken at the same time as this incident that occurred on the same day?

A Yes. These were taken at that same time.

[B-28] Q Was that how she appeared when she came to the door?

A That's how she appeared when she came to the door. That's how I noticed it.

THE COURT: These are Defense, what, A, B and C?

THE WITNESS: Yes.

THE COURT: Anything else, Mr. Rowan?

Q (By Mr. Rowan) You said earlier that the female signed a consent form?

A Yes. She signed a consent form.

Q And who gave her the consent form? Was that you or someone else?

A That was Detective Clark.

Q Okay. Were you present when that happened?

A We were probably upstairs. I did see her, and I knew that Detective Clark was getting consent to search for him due to our – after the field showup.

MR. ROWAN: Your Honor, I'm going to move to strike the testimony regarding the consent. It's apparently hearsay.

THE COURT: Overruled. The motion is denied.

Q (By Mr. Rowan) Okay. And when did you – at what point to your knowledge was the consent given?

A When she signed that form.

Q Yes, but at what point was that?

A Again, that was after we verified that from the victim that Mr. Fernandez is now a suspect for that 211 that occurred.

[B-29] Q Okay. So from the field showup, how much time went by before you became aware that there was a consent to search the apartment?

A Again, it's a little complicated because we also had two other individuals that were detained in front of the location. They – it was a field showup on them, and then after that, there was a field showup with Mr. Fernandez.

We're talking about quite a bit of – again, it's probably an estimate. After the time that Mr. Fernandez was escorted down the stairs, maybe an hour, less than that –

Q Okay.

A – that we did the consent to search, that we got that formed signed, it was probably – and it's an estimate – an hour. It could have been a little more or a little less.

Again, sir, I wasn't looking at my watch. There was a lot going on, and to me, it felt very fast how everything was happening. We also had two individuals that were in front of the location.

A Okay. But you did not yourself ask for consent. It was someone else, Detective Clark, who obtained the consent?

MS. ALLARDYCE: Objection, asked and answered.

THE COURT: Sustained.

Q (By Mr. Rowan) So you did not – you were not there to see what was said or what led up to the consent [B-30] form being signed?

A Sir, I really – I don't really remember what was said. Again, I know that Detective Clark was getting consent to search, and I was following her when she did get that signed by the female. But that was after the fact – after, again, that it was confirmed that he was a suspect for that 211.

Q Okay. And where exactly in the apartment did you find the other items that you located?

A Which items were that?

Q Well, the firearms. Let's start with that.

A The shotgun was, again – that was after we had interviews now with Roxanne R., and then their son Christian – Detective Clark spoke to Christian. After Christian was talked to, Christian informed us about –

MR. ROWAN: Objection, hearsay.

THE COURT: Overruled.

Go ahead.

THE WITNESS: Christian informed my partner and, again, showed us where that gun was hiding.

Q (By Mr. Rowan) Okay. And where specifically was that?

A It was in the living room in a heating unit.

Q Okay. And was that a heating unit that was mounted into the wall?

A Yes, it was. You have photographs of it also, sir.

[B-31] Q Of the heating unit?

A You have a picture of what the vent looks like where the gun came out of.

Q Well – okay.

A And that's a picture of the heating unit.

Q Yes. Thank you.

Showing you what's – I'll mark it as Defense D.

A Yes, sir.

(Marked for Identification,
Defense Exhibit No. D,
Photograph.)

Q (By Mr. Rowan) Is that the heating unit prior to any search being conducted?

A That's the heating unit, sir.

Q So that's how it appeared at the time?

A That's how it appeared, yes. It was all together. It was all put together. It wasn't taken apart when we –

Q Okay. And no warrant was ever obtained for the apartment; correct?

A We had consent to search, and it was signed.

Q So no warrant was obtained?

A No, sir.

Q Okay. And there was no firearm involved in [B-32] the robbery; correct?

A I would have to look at the comments of the call, but no, I think it was a knife.

Q Okay. And – no further questions.

THE COURT: Ms. Allardyce?

MS. ALLARDYCE: Nothing further, Your Honor.

THE COURT: Thank you. You can step down.

Any further witnesses?

MS. ALLARDYCE: No, Your Honor. Just I would ask to admit People's 1 by reference only.

THE COURT: Any objection, Mr. Rowan?

MR. ROWAN: Just a hearsay objection, Your Honor. I don't believe we have enough information about the circumstances of this consent. I would just renew my objection regarding hearsay and lack of foundation.

THE COURT: Overruled.

It will be received into evidence.

MS. ALLARDYCE: People rest.

THE COURT: Any witnesses, Mr. Rowan?

MR. ROWAN: Your Honor, again, as I've mentioned earlier, I just got a copy before we started this afternoon of the suppression.

THE COURT: What was – what was this –

MS. ALLARDYCE: Your Honor, basically, I had the detective, the investigating officer, bring in the file so I could reconcile it with my file to see if there was anything missing, and there were two followup reports that I did not have copies of either.

[B-33] THE COURT: Can I see them?

MS. ALLARDYCE: And I've just given –

THE COURT: I want to see if they have any bearing on this.

MS. ALLARDYCE: The first and then the last of this packet.

(A pause in the proceedings.)

THE COURT: Well, Mr. Rowan, I don't see how this changes anything. It was consistent with the testimony today.

MR. ROWAN: Your Honor, there was information in here which was never previously available which – especially regarding the issue that the complaining witness was – had been drinking, and I think that's pertinent when it comes to the identification.

Also, there's statements that the female who came to the door, Roxanne, that she was – felt that she was coerced to say certain things and –

MS. ALLARDYCE: Your Honor –

MR. ROWAN: – I think that there's enough here. The discovery has been given to me today. All I'm asking for is just –

THE COURT: What did you want to do? Hang on. What were you proposing to do?

MR. ROWAN: Well, I may wish to call some of these people as witnesses.

[B-34] THE COURT: Okay.

MR. ROWAN: I'm not asking for a lengthy continuance, if we can –

THE COURT: When did you want to continue the motion to?

MR. ROWAN: Any day this week.

I know we've already set some matters on Friday.

THE COURT: No. We can't do it. No, absolutely not. At least two weeks –

MR. ROWAN: Okay.

THE COURT: – minimum of two weeks. June 1st.

The next two weeks is just jammed.

MR. ROWAN: The 2nd?

THE COURT: How about Friday the 4th?

MR. ROWAN: That should be fine.

THE COURT: 0 of 10?

(Counsel and client conferred sotto voce.)

MR. ROWAN: Yes, Your Honor.

THE COURT: Mr. Fernandez, you have a right to a speedy trial, your trial to start within ten days of today's date. Do you waive and give up that deadline so that I can continue this to June 4 as day 0 of 10? Do you agree?

THE DEFENDANT: Yes, sir.

THE COURT: Counsel join?

[B-35] MR. ROWAN: Yes, Your Honor.

MS. ALLARDYCE: Your Honor, could I have Officer Cirrito ordered back for that date, just in case I need to recall him?

THE COURT: Officer, you're ordered back for that date.

THE OFFICER: Yes, sir.

THE COURT: Let's do that at 8:30 a.m. promptly, Mr. Rowan.

MR. ROWAN: Sure, Your Honor.

(The matter was continued to Friday, June 4, 2010, for further proceedings.)

[C-1] CASE NUMBER:	BA363324-01
CASE NAME:	PEOPLE VS. WALTER A. FERNANDEZ-01
LOS ANGELES, CA.	FRIDAY, JUNE 4, 2010
DEPARTMENT C-130	HON. WILLIAM C. RYAN, JUDGE
REPORTER:	RONALD KIM, CSR NO. 12299

APPEARANCES: THE DEFENDANT BEING PRESENT WITH COUNSEL, MATTHEW ROWAN, DEPUTY PUBLIC DEFENDER; EMILY ALLARDYCE, DEPUTY DISTRICT ATTORNEY, REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA.

THE COURT: People versus Walter Fernandez, BA363324.

MR. ROWAN: Matthew Rowan, deputy public defender, on behalf of Mr. Fernandez.

MS. ALLARDYCE: Good morning, Your Honor. Emily Allardyce on behalf of the People.

THE COURT: This is here on a 1538.5 motion.

MR. ROWAN: Yes, Your Honor.

THE COURT: What were we doing on it?

MR. ROWAN: Well, Your Honor –

THE COURT: I have notes on it, but I don't remember where we are in the process.

MS. ALLARDYCE: Your Honor, my recollection was that I had put on all of the People's evidence. I had provided some discovery to the defense that I

believe he wanted an opportunity to investigate, potentially call his own witness.

THE COURT: I think I remember that now, and do [C-2] you want to call someone?

MR. ROWAN: Yes, Your Honor. The situation – one of the witnesses that we were going to put on today told me she was going to be here. She's not here yet. I don't know if she's just running late, but I haven't been able to get her –

THE COURT: You want me to pass this and come back to her? Can you come back?

MS. ALLARDYCE: I can come back, Your Honor. I just –

THE COURT: I have a hearing at 10:30 that's going to take about a half an hour.

MS. ALLARDYCE: My question is whether or not this person is actually going to show up or –

THE COURT: You know, it's hard to get through weapons screening, and it's hard to get up in the elevators. I have to factor that in. I mean, I – I don't issue bench warrants at 8:30, and you know, they're supposed to be.

In fairness – at some point, I have to say, Mr. Rowan, it's time to cook or get off the stove, but other than that, you know, I'm not ready to say that – I'll give you enough time to have the witness show up. We like these things decided on the merits.

MS. ALLARDYCE: Yes.

THE COURT: Second call. You're going to come back out. We'll wait and see if this witness comes.

[C-3] (Unrelated matters were heard.)

THE COURT: Recalling Walter Fernandez, BA363324. Mr. Fernandez is again present. This is here on a continuation of a 1538.5 motion.

Are you ready to go?

MR. ROWAN: Yes.

THE COURT: Any witness you'd like to call?

MR. ROWAN: Yes, Your Honor.

THE COURT: Go ahead.

MR. ROWAN: The defense calls Roxanne Rojas.

ROXANNE ROJAS,

called as a witness by the Defense, was sworn and testified as follows:

THE COURT: Okay. Ms. Rojas, come on up.

You're going to stand by behind the court reporter. That's the man in the blue shirt, and face the clerk to be sworn in.

THE CLERK: You do solemnly state that the testimony you are about to give in the matter now pending before this court shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Please have a seat.

Please state both your names, and spell it for the record.

[C-4] THE WITNESS: Roxanne Rojas, R-o-x-a-n-n-e R-o-j-a-s.

THE COURT: Mr. Rowan.

MR. ROWAN: And, Your Honor, may the – we would ask that the People's potential rebuttal witness be excluded.

THE COURT: Officer, could you wait outside please.

THE WITNESS: Yes, sir.

Q (By Mr. Rowan) Good morning, Ms. Rojas.

A Good morning.

Q Were you present at your home on the morning of October 12, 2009?

A Yes, I was.

THE COURT: A little louder.

THE WITNESS: Yes.

THE COURT: You can pull the microphone up to you if you'd like.

Q (By Mr. Rowan) And at some point that morning, did police come to your door?

A Yes.

Can you tell us – do you know why they came to the door?

A I don't know actually. They were pretty much already surrounding it. They were – I noticed that my neighbor came upstairs and told me that there was cops outside, but they didn't know why.

Q Okay. So you hadn't called the police?

[C-5] A No.

Q And what happened when the officers came to your home?

A They came to the back door. It was (unintelligible).

THE COURT: I'm sorry?

THE WITNESS: It was about six or seven police, and they were all in the back stairs. Then somebody knocked on the door, and I had been – I grew up with him, but I hadn't seen him in years. So when I opened the door, it was weird because I – you know, here's the police now, and I said –

THE COURT: You knew one of the officers?

THE WITNESS: Yes.

THE COURT: You'd grown up with him?

THE WITNESS: Yes, elementary, middle school.

So I went –

(A pause in the proceedings.)

THE WITNESS: And I called him by his first name because I didn't know – I didn't know his last name, but I called him by his first name. I said Rene. And he – since he hadn't seen me like so shooken up, he said, "What's going on, Roxanne?"

And I told him nothing, and he's like what's going on? Who's in your house? And I was like me and my kids and my boyfriend, I told him. And my [C-6] boyfriend was – is still in his boxers, and he barely walked to the kitchen door.

A He asked me if he could go in the house. I hadn't even answered. My boyfriend was walking through the kitchen.

Q So let me just stop you just so we can get this clear. You said the officer went to the kitchen door?

A Yeah. He was in the kitchen door.

Q Okay. And had you told him he could come inside?

A No.

Q Okay. So, basically, you opened the door, and then the officers just came in?

A He actually – no. First, I was at the door. I opened the door, and he asked if he could come in. But I didn't even get to answer. I didn't even answer. I told him my kids are inside. I didn't answer yes. I didn't say anything.

When he was walking through the kitchen, my boyfriend was walking through the kitchen, and as soon as Rene seen him, they – he just pushed the door, and they all just came in like – like my kitchen's small so pretty much they were all over like just like wrestling him down, like they didn't even try to – they just pretty much rushed him in.

Q Okay. So did they come in, and they put handcuffs on him?

[C-7] A Well, they were – well, it took about five of them because they were like literally pinning him down. So when they pinned him down, they didn't put handcuffs on him, but they dragged him all the way down the stairs. So –

Q Okay.

THE COURT: Just for the record, who is your boyfriend?

THE WITNESS: Walter Fernandez.

THE COURT: The defendant?

THE WITNESS: Yes.

THE COURT: Okay. Thank you.

Q (By Mr. Rowan) And what happened after they took Mr. Fernandez down the stairs?

A They were already in my house. It was – I hadn't even said, oh, come in or have a seat. Right away, they were like – oh – they started point out these papers.

Due to like something a month prior to that, they had already handed me (unintelligible) my papers. So I was kind of like overwhelmed by the whole situation. I felt like they were going to take my kids from me. So –

THE COURT: Did the officers say they were going to take your kids or call D.C.F.S.?

THE WITNESS: Yes, they did, but they didn't call D.P.S.S.

THE COURT: Did they say that?

[C-8] THE WITNESS: No. They told me they weren't. They said they pulled my son outside, and they started questioning my four year old son without my permission. So I told him –

THE COURT: Is that Christian.

THE WITNESS: Yes. It's Christian. So I told Officer Cirrito. He was the main one that was questioning me that night – I mean, that day, and I told him that's illegal. Can I at least be present while you guys pull my son to the room? And he said no because that's going to determine whether or not we take your kids from you right now or not, and so pretty much I felt like I was pressured into even giving them a consent. I felt like I had no rights.

Q (By Mr. Rowan) Okay. And did you ever make any statements to the officers that Mr. Fernandez had hit you?

A No, he didn't.

Q Okay. And how long were they in your apartment for?

A For about four or five hours.

Q And how long – did they – you said that you felt pressured to give consent?

A Yes. I pretty much was pressured into it.

Q Okay. And at what point – how long had they been in your apartment before that happened?

A They had already been in my apartment for an hour and a half to two hours before – they were like [C-9] trying to convince me to sit – like say that he'd hit me. I had to repeat myself over and over again that he hadn't hit me. I had told him the story. There was people in the stairs that they let go that day, and they didn't even question them, you know.

Q Okay. And did you tell the officers – well, let me ask it this way. Did you say anything to them about how you'd gotten the – what they're asking her about?

A Well –

Q The officers, was there any reason why they were asking you if he had hit you?

A I wouldn't know why.

THE COURT: How would she know that?

MR. ROWAN: Okay.

THE COURT: The objection would be calls for speculation. She can't read the officer's mind.

MR. ROWAN: Okay. No further questions.

THE COURT: Well, I'm a little unclear on the sequence of events because at one time you got a little upset in your testimony so it's not clear. I want to go back over – I want to make sure I understand what your testimony is.

Officer Rene and five or six other officers show up at your back door, who go into your kitchen; right?

THE WITNESS: Yes.

THE COURT: You're on the second floor?

[C-10] THE WITNESS: Yes.

THE COURT: Up the stairway?

THE WITNESS: Yes.

THE COURT: Outside the stairway?

THE WITNESS: Yeah, outside the stairway.

THE COURT: You opened the door. Rene asks you what's going on.

THE WITNESS: Yes.

THE COURT: And you say?

THE WITNESS: I told – well, pretty much because of the incident that I had had like 15 minutes prior to that – because they were all hanging out in the front because there's like a front entrance where it's like steel. It's not like a –

THE COURT: What incident did you have 15 minutes earlier?

THE WITNESS: I had – well, a girl that lives around that neighborhood, she came to my house and made her get into a confrontation at my front door.

THE COURT: 15 minutes earlier.

THE WITNESS: Yeah, 15 minutes prior to that, and I probably – not even – like – well, yeah, 15, 20 minutes prior to that.

THE COURT: Completely unrelated.

THE WITNESS: Yeah, completely unrelated.

THE COURT: Okay.

THE WITNESS: So –

THE COURT: And you said – who was hanging out? [C-11] You said they were all hanging out?

THE WITNESS: A bunch of people like –

THE COURT: Not police officers.

THE WITNESS: No, not police officers.

THE COURT: People that were friends of Vanessa or neighbors?

THE WITNESS: Yeah. Girls that were friends of Vanessa. They were like minors. They were loitering pretty much.

THE COURT: I got that. So the police show up at your back door. You think it's related to Vanessa?

THE WITNESS: Yeah. That's what I thought it was too. I thought probably somebody called because they heard me arguing with her or something like that.

THE COURT: But you don't know how the police arrived at your back door?

THE WITNESS: No.

THE COURT: You just know they showed up?

THE WITNESS: Yeah. They just showed up.

THE COURT: So Rene says what's going on?

THE WITNESS: Yeah. He says like I have some marks on me so –

THE COURT: Where did the marks come from?

THE WITNESS: From me fighting with her.

THE COURT: With Vanessa.

THE WITNESS: Yeah. We had a physical – it was like not even ten – like not even five minutes long.

THE COURT: Okay. So then what happens next?

[C-12] THE WITNESS: So after he sees like the visible marks on me, and he – they right away when they asked me – they asked me who's inside my house, and he had just walked in the door, the back door. So we were like talking about it. I had just finished telling him what happened.

So – because I wanted to go have a cigarette right prior to that. So me and him were arguing about that, like not loud, but we were like – he was telling me like why did I open the front door for that girl when the cops were already like surrounding the whole building that was there, helicopter and everything.

So pretty much I was like what's going on. You know, I was like "discombobled," and right away when I – when he seen him walking through the kitchen door, and he automatically assumed, oh, he hit me.

THE COURT: Okay. : understand that.

So then when the officers see your boyfriend, they detain him?

THE WITNESS: Yeah. They just –

THE COURT: Five of them –

THE WITNESS: Yeah.

THE COURT: – take him down to the floor –

THE WITNESS: Yeah.

THE COURT: – and cuff him and drag him down the stairs.

THE WITNESS: All in front of my children.

THE COURT: Okay. In front of your children.

[C-13] So what happened after they took him out of your apartment down the stairs?

THE WITNESS: They took –

THE COURT: What did they do next? Take it step by step.

THE WITNESS: They took him out of my apartment, and Rene came up to me a bunch of times and tried to get statements. Cirrito did too. They pulled my son aside and –

THE COURT: What were they asking?

THE WITNESS: If he had hit me, about the gang around that neighborhood, if I was from there, what do I know about them, just, you know, all that stuff.

THE COURT: All right. And then what happened? Then at some point, one of the officers pulls Christian aside, Officer Cirrito?

THE WITNESS: No, not Cirrito. Clark, Officer Clark.

THE COURT: Pulls Christian aside.

THE WITNESS: Pulls Christian aside.

THE COURT: And you object to that.

THE WITNESS: And I object to that. I was like what's going on? There was like –

THE COURT: And then what did Officer Clark say?

THE WITNESS: No. Officer Clark already had my son in my room when I – Mr. Cirrito was on my couch talking with me. But I told Cirrito, you know, you guys can't do that. Can I at least be present while you guys [C-14] are talking to my son? You guys can't do that. You guys can't –

THE COURT: What did they say?

THE WITNESS: And he goes yes we can. We can do that because this is going to determine whether or not we take your kids from you right now or not.

THE COURT: Okay. You got upset about this.

THE WITNESS: Yeah.

THE COURT: Then what happened next? I know this is upsetting, but I need to get it step by step so I understand what happened. So take a deep breath and try and just to give it to me step by step.

THE WITNESS: So after that, they – Officer Rene comes up to me and tells me, well, for my safety, you don't know me, and you don't know me and we never grew up together and all that, and I was like what's going on? They pulled out a paper for me to sign. They told me I need to sign it because if not –

THE COURT: What exactly did they say? Bring out the paper, and they put it in front of you.

THE WITNESS: Yeah. They put it in front of me.

THE COURT: What were the officer's exact words as best you can recall?

THE WITNESS: They – pretty much, he said we need you to sign this paper right here because, if not, if you don't give us consent, he said we could get a judge to do a search. He said we could get a judge to search your house, to sign for a search.

[C-15] THE COURT: Okay. And then what did you do?

THE WITNESS: And then I really didn't say anything. I felt pressured about it, like I didn't feel like I was hiding anything. I just wanted – you know, I feel just wanted everything to be okay. You know, I just wanted it to just end so I signed it.

THE COURT: Did you think about whether you were going to sign it or not?

THE WITNESS: Yeah, I did. I didn't want to sign it.

THE COURT: Okay. But you did think about it?

THE WITNESS: Yes, I did.

THE COURT: Anything further?

Q (By Mr. Rowan) You said that they told you, if you didn't sign it, that they'd get a judge to issue a search warrant?

A Yes.

Q Okay. Was this before or after the conversation about taking your kids from you?

A This was after.

Q Okay. And how much after was that?

A This is like 20 minutes after that, like 30 minutes.

Q Okay. And did they still have your son in the other room?

A No.

Q Where was your son?

A I had him in the living room. I didn't let [C-16] them take – leave us outside while they searched my house because I didn't want my kids to be outside the whole time.

So I had my kids with me in the living room, and that's the only time Clark like told him like come here, you know, and like my son, of course, like got up and went with her, like she – you know, he's little.

Q Okay. And you said that they'd already been in there for a couple of hours before you signed –

A Yes.

THE COURT: What were they doing before you signed the consent form?

THE WITNESS: They were just looking around. They weren't touching anything but looking around.

THE COURT: Okay.

MR. ROWAN: No further questions.

THE COURT: Ms. Allardyce?

MS. ALLARDYCE: Thank you.

CROSS-EXAMINATION

BY MS. ALLARDYCE:

Q Good morning, Ms. Rojas.

A Good morning.

Q You testified in the preliminary hearing in this case – is that correct? – back in December?

A Yes.

Q And you had met with me and the detectives in this case; is that correct?

[C-17] A Yes.

Q And all during the pretrial or the conferences prior to that preliminary hearing, you had been having conversations, lengthy taped conversations, with the defendant while he was in custody; isn't that correct?

A Well, he did call me a few times.

Q Well, more than a few times.

MR. ROWAN: Objection, Your Honor. This is not relevant.

THE COURT: Well, let's wait and see.

MS. ALLARDYCE: It goes to bias, Your Honor.

THE COURT: Let's wait and see.

Q (By Ms. Allardyce) I believe – I've personally listened to over eight hours of conversations that you and the defendant had had while he was in custody pending this case; is that correct?

THE COURT: Well, I don't think she can know whether you personally listened to eight hours.

Do you think the conversations all together might have added up to eight hours when you think about all of them together?

THE WITNESS: I don't really – I don't have money to put on my phone like that.

THE COURT: Did you have lengthy conversations?

THE WITNESS: I did have a few conversations with him.

THE COURT: Would you say they were lengthy?

[C-18] THE WITNESS: Like hours long?

THE COURT: Well, not hours, but longer than 5 or 10 minutes.

THE WITNESS: Yeah, 15-minute long conversations, yeah.

THE COURT: All right. Ms. Allardyce.

Q (By Ms. Allardyce) And you discussed with the defendant what you were going to testify to; isn't that correct?

A I pretty much told him, you know, this is what's going to happen, you know. I have to tell them what happened. The cops were already harassing me every time I walked down the street over there. So I pretty much felt like, you know –

Q Isn't it correct, Ms. Rojas, that what you initially told the officers and what you're now testifying to and what you've testified to at the prelim has changed?

A No, it hasn't.

Q It hasn't?

A My story now is the same as the last story that I said the last time I was on the stand.

Q Okay. How do you feel about the defendant? Do you love him?

A He's the father of my children. I have many years with him. He's a good friend, a good father. I do have a lot of love for him.

Q Isn't it true, ma'am, that on those tapes [C-19] you say hundreds of times how much you love him, how you'll never leave him, how you'll be there for him?

A I will.

Q And you'd say anything for him?

A No, not that I'd say anything for him.

Q All right. I want to talk a little bit about the facts of this particular case. You indicated that an officer came to the door, someone named Rene that you had known previously; is that correct?

A Yes.

Q I'm looking at the police report, and I see three officers mentioned as conducting this call. There's Officer Cirrito. Is that Rene?

A No.

Q Okay. There's Detective Clark, female. Is that Rene?

A No.

Q And Detective Corona, is that Rene?

A No. Rene Avila has not been to court since then, and that's why I always ask that question of why is he not here.

Q Okay. So you do know the last name?

A Yes, Avila, Rene Avila, because I went and got him out of my yearbook. I looked him up in my middle school yearbook.

Q And prior to the officer –

THE COURT: What middle school would that be?

THE WITNESS: Marina Del Rey Middle School.

[C-20] (By Ms. Allardyce) Prior to the officers, ma'am, coming to the back door, isn't it true that the defendant had actually run up the steps of the back door and entered your apartment through the back door?

MR. ROWAN: Objection, calls for speculation.

THE COURT: Overruled.

THE WITNESS: I wouldn't be able to – he didn't run because – I wouldn't be able to see through walls, first of all. I was in my living room. He didn't run. He came in. He was smoking a cigarette.

THE COURT: Did he come in through the back door?

THE WITNESS: He was only downstairs in the bottom stairs. So, yeah, he did come in through the back door.

THE COURT: Which door did he come in?

THE WITNESS: The back door.

THE COURT: You have a front door and a back door?

THE WITNESS: Yeah.

THE COURT: He came in the back door?

THE WITNESS: He came through the back door.

Q (By Ms. Allardyce) And he was all sweaty; correct?

A No, he wasn't.

Q So if the officers mentioned in the report that he was sweaty, that would be incorrect?

A Yeah. He wasn't sweaty, not that I recall. He wasn't sweaty.

Q Okay. And you said that Rene Avila, Officer Avila, that you knew him in middle school; is [C-21] that correct?

A From elementary, middle school and high school.

Q And he said something to you prior to coming in?

A He asked me what was going on.

Q Okay. Prior to the officers arriving, isn't it correct that you and the defendant had been having a loud confrontation?

A Not me and the defendant. Me and Vanessa were having a loud confrontation, and then when he came upstairs and he'd seen me like that, he was like what happened to you, you know, and I told him what happened, and he was like why did you even open the door?

Q Who is Vanessa?

A Vanessa is – she lives down the street.

Q What's her last name?

A I have no clue what her last name is.

Q You don't know her last name?

A No, I don't.

Q Did you ever the tell the officers –

A I told the officers. The officers most likely let her walk right through them. They didn't even bother to ask anybody who was hanging out on those front stairs anything.

Q So it's your testimony that prior to the defendant coming home, you and Vanessa are having an altercation?

[C-22] A He was only outside. He was downstairs. Me and Vanessa were having a confrontation. It's a big ways from the back to the front. It's not like – it's just right close to each other. It's a big ways, and the bottom is closed. So it's enclosed. You can't really hear.

Q So you and Vanessa are having a fight, a loud fight. The defendant is downstairs having a cigarette out in the back?

A Yeah. Most likely – my neighbors would always come out too. So my neighbor – I know my neighbor, she heard, so she came upstairs.

Q He never – the defendant never came back to see what was going –

A Yeah. He did come back upstairs.

Q Well, how many minutes after the fight?

A It was probably like – not even like – I didn't even fight with her for more than five minutes. We got into a physical fight. It didn't last more than five minutes when he most likely heard. That's why he came upstairs or something or after his cigarette, and he seen me like that. And it wasn't even within ten minutes or five minutes after that fight. Like he came in right after we fought.

Q Vanessa had punched you in the nose; is that correct?

A Yes, she did.

Q And you were bleeding when the officers [C-23] arrived –

A Yes, I was.

Q – isn't that correct?

A Yes, I was.

Q And you had a swollen nose at that time; isn't that correct?

A No. It wasn't swollen. It was barely getting swollen.

Q You had a bump over your eye?

A Yes, and on my forehead actually.

Q And you had blood –

A I had –

Q – wet blood –

THE COURT REPORTER: I'm sorry, Your Honor.

THE COURT: Would you please let her get her question out before you start answering. The reason for that is that, even though you know where she's going, the question, the court reporter can only take one person talking at –

THE WITNESS: I understand.

THE COURT: So wait for the period in the sentence before –

THE WITNESS: Okay.

THE COURT: – you start your answer.

THE WITNESS: Sorry.

THE COURT: It's all right.

Ms. Allardyce, once more.

Q (By Ms. Allardyce) And you had blood on your [C-24] shirt; correct?

A Yes.

Q. And that was visible to someone standing just a few feet away from you?

A Yes.

Q When the officers came to the door, that's the condition that you were in; correct?

A Yes.

Q And you stated that the officers rushed in and pushed down your boyfriend?

A Yes, they did.

Q Okay. Which officers were those?

A Well, I didn't get all of their names. I should have, but I don't – Rene was the main one when they cuffed him and dragged him out.

Q What about Officer –

A Cirrito didn't – he didn't even – it was like six other cops.

Q Was he present?

A Yes. He was present. He was downstairs with his little folder.

Q Okay. And you stated that the defendant was in the kitchen at that time; is that correct?

A Yeah. I guess because he heard me talking to somebody in the back door, and he walked towards the kitchen. That's when Rene was like – he pretty much didn't say anything. My door was wide open, and he just came in, and since the cops saw him come in, all of them [C-25] came in.

Q The defendant has –

THE COURT: Ms. Allardyce, one moment please.

(A pause in the proceedings.)

THE COURT: Go ahead, Ms. Allardyce.

Q (By Ms. Allardyce) The defendant has – and it was visible at that time – kind of a unique tattoo on his head; is that correct?

MR. ROWAN: Objection, relevance.

THE COURT: Overruled.

THE WITNESS: He has – yeah, he has tattoos.

Q (By Ms. Allardyce) Okay. It's a pretty big tattoo; is that correct?

A Yeah.

Q And at that time his head was shaved; correct?

A I believe so.

Q Okay. And you testified that these officers rushed in; correct?

A Yes.

Q Was – the defendant, was he visible from the doorway?

A Yeah. He was visible from the doorway.

Q Okay.

A When he was barely walking into the doorway to the kitchen, when they seen him walking into the – [C-26] through the front of the kitchen and the cops seen him, they rushed them. Literally Rene ran in, and the rest ran in with him.

Q Okay. And you stated that they all took him down at that point?

A Yeah.

Q What happened next?

A They put cuffs on him and dragged him down while he was screaming my kids' names and our names.

Q You indicated, ma'am, that the officers were threatening to take your children away from you?

A They threatened me twice. The first time they threatened me, yes, that if I didn't let them talk to my son that they were going to call Children's Services. That was going to determine that.

The second time they called me, they told me to go to the station where they told me, if I – they could get me out of that neighborhood. All I had to do was sign these papers pretty much incriminating him, and I told them that I didn't need the assistance, that I didn't need –

Q Now, you seem pretty emotional about this particular issue, and currently, isn't it true, ma'am, that your children have been taken away –

A Yes, they have.

Q – unrelated to this incident?

A Yes – no. It's related to this incident because my case was opened to this incident.

[C-27] Q Okay. And isn't that the real reason why you have animosity towards law enforcement –

A No.

Q – in this case?

A I don't have animosity at all. I take parenting classes, domestic violence classes, anger management

classes. I don't have any type of animosity. I just want all of this to be – it's a nightmare to me already, and I want it to end.

Q Isn't it true, ma'am, that the officers actually just asked you to sign this and that you did give them consent, but subsequent to that, your children have been taken, and now, you're using that as an excuse?

A No. My children barely got taken from me. My children just got taken from me about two weeks ago. This had nothing to do – nothing to do with that consent or me signing. This had to do with the fact that I had to take all those classes, and I didn't know – like I had to get a family prevention worker, but it had nothing to do with them. They didn't start pushing the issue – they didn't even call Children's Services on me until the last time I came and testified here.

Q Ma'am, after this incident, isn't it correct that you actually agreed to an interview with the detectives, Clark and Cirrito, and that interview was tape recorded?

A Yeah, but not incriminating my boyfriend at all because I didn't say – it wasn't if –

[C-28] Q That's not my question. Did you agree to the interview?

A Yes.

Q And during the interview, didn't you say on tape that you would not testify because you didn't want to be a rat or a snitch?

A No. I did not say that, and on top of that, why would I be saying that when I'm going to go and talk about somebody else, not him? When I went over there for that interview, it wasn't to talk about him.

They told me it was to talk about him, but the whole interview was to talk about everyone else on that block.

Q You did submit to the interview though; correct?

A Yes, I did.

Q Okay. It was a lengthy interview – correct? -- about 40 minutes?

A Yes, and that's after that interview is when they pulled out those papers, and they told me they would give me money. And I told them that I didn't want to sign those papers, that I didn't need their money to move out of that neighborhood.

Q When you say the officers offered to give you money, the officers actually –

A Well, I –

THE COURT REPORTER: I'm sorry, Your Honor. Can –

THE COURT: One at a time.

[C-29] (By Ms. Allardyce) Offered relocation; isn't that correct?

A No. They pretty much told me that, if I didn't testify, I wouldn't get relocated.

Q Well, you –

THE COURT: You've made your point, Ms. Allardyce.

MS. ALLARDYCE: Yes.

THE COURT: Let's move on. Just a couple of more minutes. I have other hearings.

MS. ALLARDYCE: Yes, Your Honor.

Q My last question really is, ma'am, during your interview with the officers, didn't you admit to them after 41 minutes or so that the defendant had actually been the one that struck you in the face?

A No, I didn't.

MS. ALLARDYCE: Nothing further.

THE COURT: Okay. Mr. Rowan, if you've got something real quick, otherwise, I'm going to put this over to later in the day. I have at least two things I have to handle before noon. One's going to take a half an hour, and the other one, I don't know how long it's going to take.

MR. ROWAN: This will just be very brief.

THE COURT: Okay. Very.

REDIRECT EXAMINATION

BY MR. ROWAN:

Q You mentioned there was something that had [C-30] happened before a month prior?

A Yes.

Q What was it that happened a month prior?

A My neighbor got himself into something, and since we're the only two units upstairs, they came and raided both units while me and – while we were sleeping with our kids, and they pulled us out SWAT, guns, to me and my kids' heads.

Q Were any of the same officers present?

A Yes, but I didn't see Rene that night. They even switched shifts that night. I seen all the cops. They all know me. Over there, they all know me. They seen me. They just stared at me.

Q What was your emotional state when the officers were asking you to sign the form?

A I pretty much feel like the same thing was happening again.

Q Were you crying or –

A Yes. I haven't been the same since then.

Q Okay.

A I have to go to counselling.

Q Did you ever tell him you didn't want to sign the forms?

A I didn't want to sign it. I felt –

THE COURT: Did you ever tell him that?

THE WITNESS: No. I didn't tell them. I was too scared to even tell them.

MR. ROWAN: No further questions.

[C-31] THE COURT: All right. Anything, Ms. Allardyce?

MS. ALLARDYCE: No, Your Honor.

THE COURT: Thank you. You can step down.

Are you going to want to call a rebuttal witness or offer a transcript or anything?

MS. ALLARDYCE: Probably call a rebuttal witness.

THE COURT: 1:30. We'll pick it up at 1:30. Okay?

So keep Mr. Fernandez here for the afternoon session. You're ordered back for 1:30. You're ordered back for 1:30.

(The noon recess was taken.)

THE COURT: We're in session again upon People versus Walter Fernandez, BA363324. Mr. Fernandez is present with Mr. Rowan. The People are represented by Ms. Allardyce. This is a continuation of the suppression hearing from this morning.

Mr. Rowan, you had finished with Ms. Rojas, and we'd finished with your part of the presentation; right?

MR. ROWAN: Yes, Your Honor.

THE COURT: Did you want to call anyone in rebuttal?

MS. ALLARDYCE: Yes, Your Honor, Officer Cirrito. Recall him.

THE COURT: Officer, retake the stand.

[C-32] THE WITNESS: Yes, sir.

JOSEPH CIRRITO,

having been previously sworn, was recalled to the stand by the People and testified further as follows:

THE COURT: I don't remember. Did he testify earlier in the case?

MS. ALLARDYCE: Yes.

THE COURT: You've already been sworn once, officer. You understand you're still under oath?

THE WITNESS: Yes, sir.

THE COURT: Ms. Allardyce.

MS. ALLARDYCE: Thank you.

DIRECT EXAMINATION

BY MS. ALLARDYCE:

Q Officer Cirrito, just to clarify some things that you've testified to earlier in this hearing –

A Yes, ma'am.

Q – back on October 12, 2009, approximately 12:15 p.m., you indicated earlier that you were in the rear alley of 2223 West 15th Street here in Los Angeles; is that right?

A Yes, ma'am. It was probably about 12:30.

Q Okay.

A Yes.

[C-33] Q And you indicated that you observed a male – is that correct? – running?

A Yes, ma'am.

Q What did you see exactly?

MR. ROWAN: Objection, Your Honor. This is going back to things that the officer's already testified to.

THE COURT: That would be the objection?

MR. ROWAN: Beyond the scope.

THE COURT: Cumulative?

MR. ROWAN: Well, beyond the scope of rebuttal.

THE COURT: Well, let's wait and see where it is. Overruled. I think some of this is just to set the stage, and that's permissible.

Q (By Ms. Allardyce) Go ahead.

A I observed a male, light-skinned, wearing a light blue t-shirt, grayish tan khakis, running across the alleyway.

Q Okay. After you observed him running across the alleyway, did you see him enter into a unit?

A Again, I observed a male enter a gang location, known gang location, 2223 West 15th, 2nd floor.

Q Approximately how long after making that observation did you hear something that caught your attention?

A Again, ma'am, it was happening pretty fast with everything. I would say within five to ten minutes. I heard an argument coming from that apartment.

Q Were you able to determine whether or not [C-34] the argument that you heard was one voice, two voices, three voices? What did you hear?

A I did hear male and female voices, and it was yelling very high.

Q The location of the yelling, was that the same area you had seen this male run into?

A Yes.

Q Okay. After that, did you then – after calling for backup, did you then go to that location?

A Yes.

Q Why did you do that?

A At that point, again, as I've stated earlier, I had to investigate. I hear yelling and screaming coming from that. I don't know if it has anything to do with the incident that we were on or if it was another incident – other incidents occur. It's my duty as an officer to investigate.

Because I was in what we call raid jackets, at that detective level I was working, I called for additional units, uniformed presence.

THE COURT: Basically, you called for uniforms; right?

THE WITNESS: Yes.

THE COURT: You wanted black and whites there?

THE WITNESS: Yes, sir.

Q (By Ms. Allardyce) Was there an officer Rene Avila present?

A Yes.

[C-35] Q And who was that?

A He is a probation officer at that time. He was a probation officer.

THE COURT: What that a boot?

THE WITNESS: Yes, sir.

Q (By Ms. Allardyce) And was he the officer that went to the door to do the door knock here?

A No. We're not going to let a probation officer to go to a known gang location and knock on the door.

Q So who actually knocked on the door?

A It was, again, myself and Detective 3, Detective Corona.

Q And do you know where Officer Avila was? Was he right behind you or?

A There were several officers there. Again, it was an additional unit request. There was officers in the area because of the incident that occurred. To be

honest, I didn't see Officer Avila on the stick behind us. If he was there, he was there, but I'm not sure.

Q Okay. Were you in charge of this investigation?

A Yes. I took control of this investigation.

Q And when you got to the door, did you open the door and barge in, or did you knock on the door, or what did you do?

A Again, it was a screen door, one of those safety screen doors. I knocked on that screen door. [C-36] Again, it was Roxanne R. that answered the door.

Q That's the female that just testified earlier?

A Yes, ma'am.

Q Okay. And when she opened the door, is that when you observed the blood?

A Yes. Well, immediately, I observed the swelling in the face. That forehead and the bridge of her nose, I mean, it was very distinct, and the swelling was – it was swelling as we were talking.

I also observed that she was holding an infant, and I also observed blood on her white shirt and blood that was smeared on her hand.

Q Based upon that observation coupled with what you had heard earlier, what did you decide to do?

A Again, I tried to ask her to come out. She was in the doorway. We're talking just a regular entrance-way, holding an infant. I was asking her to step out so that we can continue this investigation.

At this point, because of the yelling I heard – but, now, the observation that I had made of her – of her face, of her arms, she's holding an infant. I believe

that there was someone in there, that an altercation had happened.

Q So what did you do?

A Again, I asked her to step out. I asked her if there was anybody else in there.

Q What did she say?

[C-37] A Again, she said it was myself and my children.

Q Did she ever say the defendant was inside the residence?

A No.

MR. ROWAN: Objection, Your Honor. It's hearsay.

THE COURT: Overruled.

Q (By Ms. Allardyce) What did you do next?

A At that point I – again, I asked her and Detective Corona was asking her to step out so that we can continue the investigation. At that point –

THE COURT: Officer –

THE WITNESS: Yes.

THE COURT: Detective – I'm sorry.

THE WITNESS: It's Officer, sir.

THE COURT: Officer, when you say you asked her to step out, you were in command voice mode; right?

THE WITNESS: Yes.

THE COURT: You were commanding her to come out?

THE WITNESS: Yes. I asked her to step out.

THE COURT: Right.

Q (By Ms. Allardyce) And why did you ask her to do that?

A Again, due to the factors, seeing the blood, the swelling on her face, the yelling, I believed that there was an altercation that occurred there, exigent circumstances. I wanted to investigate, see if there was a suspect in there.

[C-38] Also, my observations of seeing someone run across the alleyway came into my mind also. I don't know if we're going to have a barricaded suspect or what.

Q Now, at this time –

THE COURT: Would it be fair to say at that point you didn't really know what you had? You thought you might have an incident of domestic violence?

THE WITNESS: Yes, sir. At this point, my head's like a hurricane, and I'm trying to – I see a female with an infant. I see blood, swelling, the yelling, the possibility someone's in there. Is she just trying to blow me off, or is there somebody in there? Are there children? Is he holding a child hostage? I don't know what I have.

THE COURT: Okay.

Q (By Ms. Allardyce) So you were not investigating the prior 211 at this point. You were taking this as a separate D.V. incident.

A This is separate, independent at this point.

Q Did you see the defendant inside the residence at that point?

A At the point where she said she was going to step back to get her kids, which I was worried now she's now going to enter in there, officer safety is now

coming on there, that's when I saw the defendant, Mr. Fernandez, entering.

Q From where?

[C-39] A The kitchen area. I assumed he was coming from the living room area. Again, I can't see the whole kitchen, but he approached where I have no visual of him.

Q Was the defendant sweaty?

MR. ROWAN: Objection, leading.

THE COURT: Overruled.

THE WITNESS: Yes. The defendant was just in a pair of boxer shorts, like a dark plaid colored boxer shorts, and he was sweaty.

Q (By Ms. Allardyce) Did Roxanne R. ever tell you about the defendant being sweaty?

A She brought that up.

MR. ROWAN: Objection. Calls for hearsay.

THE COURT: Overruled.

THE WITNESS: I believe it was two days later we had a followup investigation at Olympic station where I re-interviewed her and – just to kind of tell her what's going on. I brought up in the interview about him being sweaty, and she said that she observed him being sweaty, and that's not normal. I'm not sure of the exact words, but it's on that audio.

Q (By Mr. Rowan) Okay. That's tape recorded?

A Yes.

Q Once you saw the defendant, what happened next?

A At that point, Detective Corona and I entered the location. I put my hands on his right arm. Detective Corona put his hands on his left arm.

[C-40] Q Let me stop you there. Did you take the defendant down to the ground?

A No.

Q How many people were detaining the defendant?

A It was myself and Detective Corona, and then to calm everything, to diffuse the situation, we had Officer Pagallo put handcuffs on him.

Q And was Officer Avila in any way involved in this arrest?

A I did not see him there, in that immediate area.

Q Okay.

A And it was a very small area.

Q At this point, was the defendant actually being arrested, or was he just being detained pending the investigation?

MR. ROWAN: Objection. Calls for illegal conclusion.

THE COURT: He's a police officer that has to know the difference.

Overruled.

THE WITNESS: At this point he's being detained for this domestic investigation.

Q (By Mr. Rowan) Okay. What happened next?

A It's part of our protocol now to split everyone up, the witnesses and victims. At this point where we are, we did clear the place just for a safety [C-41] check to clear the location. I had Mr. Fernandez escorted. We

were right by that back doorway. I had him escorted by officers down the steps.

Q Was he pushed down the steps or dragged down the steps?

A No. There were two officers that were escorting him down the steps.

Q Was there anything inside the apartment in plain view that you observed that you believe may have been evidence?

A Well, there was – after the officers were conducting the protective sweep, there was evidence of possible gang paraphernalia, clothing on the floor in the living area.

Q What about a knife?

MR. ROWAN: Objection, Your Honor. That's lack of foundation. Hearsay. The officer's testimony regarding what sounded like what other officers observed –

THE COURT: How did you know what other officers observed, or did you observe it yourself?

THE WITNESS: Sir, I came in after the fact. I followed Mr. Fernandez as he was being detained. Uniformed officers did a protective sweep of the area. They –

THE COURT: Of what area?

THE WITNESS: Of the kitchen area, the living room area.

THE COURT: Was this after you cleared the [C-42] premises?

THE WITNESS: They were doing a protective sweep to clear the premises.

THE COURT: To clear?

THE WITNESS: Yes.

Q (By Ms. Allardyce) What else was found?

MR. ROWAN: Your Honor, in that case, I renew my objection. Move to strike as hearsay.

THE COURT: Sustained. Stricken.

Q (By Ms. Allardyce) Do you know if anything else was found inside the residence.

A They found a – at first –

MR. ROWAN: Objection. Same objection. Lack of foundation.

THE COURT: Sustained.

Q (By Ms. Allardyce) Was something presented to you as being found inside the residence that's written in your report?

THE WITNESS: Yes.

MR. ROWAN: Objection. Calling for hearsay what was presented to him as having been found.

THE COURT: No. This is his perception, what the witness saw or heard or did.

Overruled.

Q (By Ms. Allardyce) What did you see?

A I saw a – what appeared to be a folding knife, a butterfly knife. It was like stainless steel.

Q Okay. Now, as the defendant was being [C-43] escorted down the stairs, did you notice something on the defendant that caught your attention?

A Yes.

Q What was that?

A I immediately observed a tattoo that was on top of his head.

Q What about that was significant?

A In the comments of the call, which came out – some of the comments brought up that the suspects were possible Drifters gang members. There was also a comment of a call that one of the suspects had a L.A. tattooed on the top of his head.

Q Is that what the defendant had?

A Actually, the defendant has a – he has two L's that are reversed to create a W with an A.

Q When was the consent to search form signed by Roxanne Rojas?

A After we had the victim of the robbery ID Mr. Fernandez as the key robbery suspect, at that point, now, Detective Clark and I went back upstairs, and we got consent to search by Roxanne R.

Q Where was the consent obtained? Was that outside the residence, or were you inside, if you remember?

A I don't exactly remember. I know I interviewed her for the domestic violence investigation in the living room. It might have been in there. I'm not sure though.

[C-44] Q When the consent to search form was signed –

THE COURT: Well, let me back up. Did she ever mention that she had gotten in an altercation with a Vanessa, that's how she got the injuries?

THE WITNESS: She brought up that she got in a confrontation with a Vanessa during our interview, and I put that in the report.

THE COURT: That was in the living room right there at the scene?

THE WITNESS: That was when I discussed –

THE COURT: Not two days later when you talked to her?

THE WITNESS: She brought that up again, but she did, and I put that in the initial report that she – that – the confrontation between her and Mr. Fernandez was over Vanessa.

THE COURT: And – but the injuries she received were from Vanessa, not Mr. Fernandez?

THE WITNESS: No. She brought up during that confrontation that her and Mr. Fernandez got into a physical altercation.

THE COURT: Thank you.

Q (By Ms. Allardyce) And just to go back to that, did she actually say to you after about 40 minutes of this interview, finally admitting that the defendant was the one that had hit her?

A It was – again, there's a lot going on, [C-45] but by the time that I sat down again – I was the investigating officer so I sat down with her. I know Detective Clark was there for a short period of time in the beginning.

We started discussing what happened. She told me that they got in a confrontation over this female, Vanessa, from a few days ago, and that it escalated and that he struck her in the face and that he walked away towards the bedroom area.

Q Okay. And was there a conversation with Roxanne R. prior to obtaining consent to search or after if you remember?

A Yes. It would have been after. We got the consent to search before that –

Q Okay.

A – I believe.

Q When you got the consent to search, did you ever threaten or in any way tell Roxanne R. that you were going to take away her children if she didn't sign the consent?

A No.

Q What did you say, if anything, about notifying protective services?

A Well, at this point – it was after the fact – after we did the search and found the shotgun, at this point, I did let her know that I am going to be notifying Department of Family and Children Services. When you have a four year old pointing out where a [C-46] shotgun is, I have to. Otherwise, it's neglect of duty on my part.

Q Okay.

THE COURT: Is that before or after she signed the consent to search?

THE WITNESS: That was after, sir.

Q (By Ms. Allardyce) And the consent to search, were any conditions placed on that as you were asking her to sign that? Did you threaten her or make any conditions about the search? Anything said about it?

A No. I have no reason to threaten her.

Q Okay. Did you ever say to her that you could have gotten a judge to issue a search warrant but that this is the easier way, something like that?

A No. I never brought that up.

Q Okay. After this case was filed, did you then take it upon yourself to record some of the jailhouse conversations between the defendant and the victim?

A Yes, I did.

Q And approximately how many hours of conversations were recorded between the defendant and the victim prior to the preliminary hearing?

A I'm going to give an approximate of at least about six to ten hours.

Q Okay. And these were all phone calls that the victim had made to the defendant or the defendant had made to the victim?

[C-47] A The defendant would make the phone calls to the victim. They're all recorded.

THE COURT: Ms. Allardyce, I'm not aware of any way that somebody outside the jail can get –

MS. ALLARDYCE: That's true, Your Honor.

THE COURT: Except maybe a judge.

Q (By Ms. Allardyce) And was there a protective order at this time? Do you know if that was in effect?

A For what?

Q For there to be no contact?

MR. ROWAN: Objection. Calls for speculation.

THE COURT: If he knows.

THE WITNESS: No, not that I know of.

Q (By Ms. Allardyce) Okay. During your conversation with the victim, did she ever say anything to you about being a snitch or a rat?

A During the second interview at Olympic station, she said several times that she doesn't want to be considered a rat. She was very upset about the situation. There was a lot of talk on the street, who else was involved. She was upset that those individuals didn't come forth. Again, she didn't want to be placed as a rat. She said that several times.

Q Are you aware, Officer, whether or not as a result of this case the victim's children were taken from her, based upon something you did?

A No. I didn't know.

MR. ROWAN: Okay. Nothing further.

[C-48] THE COURT: Mr. Rowan.

CROSS-EXAMINATION

BY MR. ROWAN:

Q Good afternoon, Officer.

A Good afternoon, sir.

Q Now, you testified that when you – after you observed Mr. Fernandez enter the kitchen area, that he was – that several officers detained him?

A No. At that point – I mean, he's going in the kitchen area – I'll try to draw the picture to you so you can understand.

You have this back entrance, and in the back entrance, it's like a little mud room area – that's what I'll say. That's what I think it would be – where you would walk in before you – and then to your immediate right would be the kitchen area, and it

was like a California kitchen style, very narrow, flooring, counter space on both sides.

Q Well, all I'm really trying to get at – you don't need to detail the entire premises, but what I'm trying to get at is you were at the door talking to Ms. Rojas, asking her – telling her to come outside.

A Right.

Q You then got a visual of Mr. Fernandez coming into the kitchen area.

A I mean, he's walking in my direction, and he's mad. He's upset.

[C-49] Q You see him, and he's yelling, "Get out of my house," and things like that?

A Right.

Q And that's when –

A "I know my rights."

Q And then the officers went in and –

A Well, it's not the officers. It's myself and Detective Corona. We were at the doorway. So both of us are the ones that put hands on Mr. Fernandez.

Q Okay. So you entered the apartment, and you detained him?

A Yes, yes. I grabbed his right arm, and Detective Corona grabbed his left arm. We were holding it, and he's wiggling, and he's upset and he's angry.

Q Okay.

A And then Officer Pagallo put handcuffs on him, and it kind of defused things once handcuffs were on him.

Q Where exactly in the apartment was he when you first put handcuffs on him?

A I was – I would say I walked probably three steps inside the door. Again, it's in that mud room area that would lead to the kitchen, and there was counter space and just like a narrow path. It was –

Q So what you're referring to is the back door earlier. That's actually the door you were at, speaking with Ms. Rojas?

A Yes. The back door on the second floor.

[C-50] Q Okay. Just so this isn't unduly confusing –

A I know. I'm sorry.

Q The back door, is that the normal door that you would – people would knock on to –

A You know what?

THE COURT: It wasn't the door between the mud room and the kitchen. It was the door between the top of the stairs and the mud room?

THE WITNESS: Yes. It was – so when you would make an entry into the actual apartment, there is – you open that door. It's like a little mud room and right to your immediate right was the beginning of that kitchen.

THE COURT: Got it.

MS. ALLARDYCE: And you have like a little view of the kitchen but not the whole kitchen.

THE COURT: Mr. Rowan.

MR. ROWAN: Okay.

Q And you noticed that – the tattoo that you mentioned on his head, that's when you were taking

him down the steps. That's when you first noticed that tattoo?

A As he's going down the steps, and you know, it's my view of seeing the top of Mr. Fernandez's head, that's when I observed that tattoo, and I just remembered from comments of the call, when we were finishing, I remembered that.

Q Okay. And just so we can get this clear. [C-51] I'm going to hand you a – what – I believe this would be Defense 5 if I'm not mistaken.

THE COURT: I think you might be right.

MR. ROWAN: Actually, sorry. These are – I'm using numbers. This would be Defense – I think D, I think.

THE COURT: Okay.

(Marked for Identification,
Defense Exhibit No. D,
Photograph.)

THE COURT: What is it?

MR. ROWAN: It's a photograph.

THE COURT: Okay.

MR. ROWAN: If I may approach.

Q Handing you what's been marked for identification as Defense D, is that – well, tell us what that photograph is.

A Again, it's the top of Mr. Fernandez's head, and it's two L's in reverse with an "A," and it's very similar to a Los Angeles, L.A. Dodgers logo, the L.A.

THE COURT: Can I see it please.

(A pause in the proceedings.)

Q (By Mr. Rowan) You're sort of interpreting [C-52] that as being two L's in reverse, but isn't that – you could – it could just as easily be interpreted as a "U" and –

MS. ALLARDYCE: Objection. Calls for speculation that's what he saw it as.

THE COURT: Sustained.

Q (By Mr. Rowan) Well, there's no separation between the lower sort of the horizontal bar of one "L" and the horizontal bar of the other "L." They simply join in a continuous bar going between the vertical bars what you're calling the two L's; isn't that correct?

A Yes, sir.

Q So someone could say that that's a U and not an L and –

MS. ALLARDYCE: Objection.

Q (By Mr. Rowan) – that would not be –

MS. ALLARDYCE: Calls for speculation as to what it –

THE COURT: Save it for argument. That's an argument.

Q (By Mr. Rowan) Okay. And you said that Officer Rene Avila, although he was a probation officer, he was present as part of the – whatever you want to call it – the force of officers?

THE COURT: I think the officer's testimony was he was on the stick, which means the line of officers waiting to enter the premises.

THE WITNESS: Yes, sir. I wasn't really sure who [C-53] was on the stick.

Q (By Mr. Rowan) Okay. And this whole operation that was going on that day, how long did that investigation take before all the officers left the premises?

A If I could – I mean, I could look at the comments of the call and give you the time of when they cleared. I was –

THE COURT: What's your recollection?

THE WITNESS: I would say, sir, between 3:30, probably four o'clock maybe. Everyone was left at scene. I mean, patrol officers were coming and going, but I was the investigating officer. So I was there pretty much to the end. So I am saying, I think, approximately 3:30.

THE COURT: That would be three hours?

THE WITNESS: About that, sir.

THE COURT: Okay.

Q (By Mr. Rowan) Okay. And during this time, officers, I imagine, would have been coming and going, moving around. You mentioned officers doing a protective sweep. People were searching the premises, talking to various witnesses; correct?

A It was – simultaneously, there was two other individuals that were detained. One was arrested also in the front. So there was officers around the area, and then because of the incident that occurred, now officers are going to be doing extra patrol in that area too so –

[C-54] Q. Well, what I'm getting at is this was a very fluid situation. People were – officers were moving all around you in all kinds of different tasks around the premises; isn't that correct?

A You know what, sir? At first – I have to say when I took the initiative of being the investigating officer, I then took control of the situation.

When I was upstairs, no one was just walking around. At this point now we're going to have my partner and two uniformed officers, maybe three, were around, but no one's going through anything.

Q Okay. And you said that you took Mr. Fernandez down the steps, and you actually let him out to the alley where the field showup was conducted; correct?

A Right. I walked behind – the two uniformed officers were taking him down. I was behind them. I walked down there because, after I did see the tattoo, then that – Detective Corona and a few others saw that this might be a possible robbery suspect, that we need to do a field showup. So then I was downstairs for a little while.

Q How long did it take before the field showup part was over with and you went back up to the apartment?

A Again, sir, maybe within 30 minutes, 20 minutes, maybe less. I'm not sure. I wasn't keeping track of the watch.

[C-55] Q During that time you can't know who was – might have been going in and out of the apartment during that period of time?

A You know what, sir? No. I didn't know who was – at that – point – I know they were doing a prospective sweep of that, and they're holding it.

Q And then you said that you went and you were interviewing Ms. Rojas on the couch in the living room?

A Well, in the living room area. I don't remember if I was sitting on the couch or where we were.

Q You were in the living room area?

A Yes.

Q Okay. And it was during that interview that she told you eventually that she'd been struck by Mr. Fernandez?

A Yes. Well, now, when I spoke to her, she brought it up about that that she was struck in there, struck in the face, and due to the physical observations that I made, that's what it appeared to me and the other officers.

Q That's what she told you when you interviewed her on the couch – well, not on the couch but in the living room?

THE COURT: In the living room.

THE WITNESS: Yes.

Q (By Mr. Rowan) That's not what she – that was when she told you that. That – she told you that she was [C-56] in a fight earlier; right?

A She said she was in a confrontation. I don't remember if it was a fight or – she didn't say a physical fight. She did say she was in a confrontation with Vanessa, and what's tough with that one is that, was it earlier? Two days later earlier? That, I wasn't sure. I tried to – I tried to ask her about who Vanessa was so that I could interview Vanessa, but it never came.

Q Okay. All right. And her son, Christian was also interviewed that day; correct?

A Yes.

Q And was that done by yourself or by another officer?

A That was done by Detective Clark.

Q Okay. And that was – when – at what point was Christian interviewed?

A It was probably around the same time when I was interviewing towards the end of Roxanne R.

Q Okay. And if you know, where was he interviewed?

A I believe it was in their front bedroom that faces West 15th Street. It was just next to the living room. It's a small apartment so –

Q Okay. He was taken to a different room and interviewed separate from Ms. Rojas?

A Yeah. It's routine that, when we have a domestic violence –

Q I'm not asking what's routine.

[C-57] A Right.

Q I'm just trying to get –

A Sure.

Q – the picture. Okay.

All right. And when you're at the door earlier before the detention of Mr. Fernandez, you said that you were telling her to come outside?

A Yes. I approached the door, and then I knocked on the door.

Q Okay.

A She answered the door, and I did ask her to step outside.

Q She was telling you that people in the apartment set her up, and then – but she didn't – she did not step outside; correct?

A No. She was at the –

Q And then Mr. Fernandez appeared, and you immediately went towards detaining him?

A Well, at this point, when she is saying, "I'd like to get my other child," meaning Christian, she had her infant in her arms. It's another reason why we're not going to just grab her. She has an infant in her arms.

I was trying to have her just step out and be cooperative. At that point she's stepping back and saying that – "Let me get my other child. My other :hild," at that point as she's stepping back. Again, now, things – it's like here we go, and that's when I [C-58] see Mr. Fernandez.

THE COURT: Let me ask you a question.

THE WITNESS: Yes, sir.

THE COURT: Was the screen door locked or unlocked?

THE WITNESS: You know, sir, I never tried to – I knocked on the door. She opened it but –

THE COURT: She opened it.

THE WITNESS: Yes. She opened the door.

THE COURT: So it was locked, and she unlocked it?

THE WITNESS: Yes. That – I don't know if it was or not.

THE COURT: So by the time she started to step back, the door is open?

THE WITNESS: Yes. The screen door is open. I was talking to her.

THE COURT: Mr. Rowan.

MR. ROWAN: Okay.

Q All right. She opened the – I'm just – just to make this clear, is there a – is this screen door, was that the only door that was closed when you first approached?

A It's like a security door and – it's a security door, and it's very hard to see in or – they can see out. That type – it's a security door, not a screen door, a security door. That was shut. It was like a white rusty security door. The storm door, the main door, was open.

[C-59] It was open before you got there?

A Yeah, and the only reason why – and I'm going to say it was open – when you're banging on it, it appeared that that door was open. You could kind of see that there's a mud room, but you can't see.

Q You think, but you're not sure that it was open?

A Not when she opened the door.

Q I'm not talking about that door behind the security door.

A Yeah. I believe it was open, but I'm not sure.

Q So she opened the security door when you first knocked, and she came to see what you wanted?

A Yes. I knocked on the security door, and then she answered it and opened the door.

Q So she opened the door right at the beginning?

A That's where I was able to visually see what she looked like.

MR. ROWAN: Okay. All right. No further questions.

THE COURT: Ms. Allardyce?

MS. ALLARDYCE: Nothing further.

THE COURT: Thank you, Officer. You can step down.

THE WITNESS: Thank you, sir.

THE COURT: Anything further in rebuttal?

[C-60] MS. ALLARDYCE: No, Your Honor. No further witnesses.

THE COURT: You rest in rebuttal?

MS. ALLARDYCE: Yes.

THE COURT: Okay. You wish to be heard, Mr. Rowan?

MR. ROWAN: Yes, Your Honor.

The essence of what we have here is an arrest. The officer may characterize it as a detention, but I think that would really be splitting hairs. Effectively, Mr. Fernandez was arrested. He was handcuffed inside of his home, detained, taken outside to a separate location because – a distance away for purposes that, you know, clearly had no relationship with what may or may not have been going on inside the apartment.

The officer took him to a do a field showup in the alleyway so we have a warrantless arrest of Mr. Fernandez inside his home, and this is clearly unlawful. The Supreme Court case of "Payton v. New York." It's 445 U.S. 573.

This is clearly unlawful. It's also the California Supreme Court case of "People versus Ramey," 16 Cal. 3d. 263. So I think the officers exceeded their – their – they violated the 4th Amendment by entering Mr. Fernandez's home, detaining him there.

They may or may not have had in mind that there may have been some possible domestic violence [C-61] incident that may have occurred, but they clearly exceeded the scope of any investigation for that very quickly and transported Mr. Fernandez a considerable distance away to –

THE COURT: What was the considerable distance?

MR. ROWAN: Well, I believe –

THE COURT: It was less than a hundred feet; right?

MR. ROWAN: Well, it was from the apartment to –

THE COURT: The alley.

MR. ROWAN: The alleyway, and no one's saying it was miles and miles away but clearly –

THE COURT: Well, you said considerable distance. You're talking like they moved him to Santa Clarita.

MR. ROWAN: What I'm saying is, if what the officers are interested in doing is finding out whether or not there was a domestic violence incident, then they would need to do no more than taking him – just to have him where he was, just to perhaps take him a short distance from the front door maybe, just for the sake of separating two people.

But they started leading him down the steps. There's really no reason to do that. They're taking

him somewhere else to investigate the other incident, which is why they were there in the first place.

And I think that Ms. Rojas's testimony was – is very credible. She wasn't trying to gild the [C-62] lilly, and I think she was very trustworthy. Whether or not this Officer Avila was the person that first knocked on the door on not – I'm not even sure that she actually even testified to that. I don't recall that point specifically. She just said that she saw him when she came to the door, and no one's disputing he was there. So I don't think that there's really been any impeachment as to that.

And, clearly, the situation, taking her son into another room, you know, I think that it's very believable that what happened – what she testified happened happened that they – that she felt in fear, that there have been raids there before and that she felt coerced into signing a consent form.

THE COURT: She was pressured, not coerced.

MR. ROWAN: Pressured.

THE COURT: That's argument. I understand.

MR. ROWAN: In any case, I would also point out that I think we have separate issues to consider here with regards to the suppression motion.

Even if the Court were to find that Ms. Rojas – that her eventually signing the consent form might have been not under any kind of a duress or pressure and that that can stand up, that would only deal with the items that were found inside the apartment, but we still have the separate issue of Mr. Fernandez being detained unlawfully –

THE COURT: I understand that.

[C-63] MR. ROWAN: – and the subsequent field showup and the statements.

THE COURT: I agree. They are separate and are to be evaluated separately.

MR. ROWAN: So I don't think that what the officers had was enough for them to have the right to detain Mr. Fernandez in his home without a warrant, and on that basis, I would submit.

THE COURT: Okay. Anything you want to say?

MR. ROWAN: I would also just remind the Court, because the officer testified at the previous date when he was here, that he essentially conceded that there was no connection between Mr. Fernandez and any previous incident that he – all he had was the yelling and –

THE COURT: Standing in the doorway.

MR. ROWAN: Right.

THE COURT: I agree. I remember that.

He basically made the same point today.

MR. ROWAN: Right.

THE COURT: Ms. Allardyce?

MS. ALLARDYCE: Just briefly, Your Honor. I think what we have here, the officer, he's monitoring the area, high gang location. He knows the – high gang activity in this particular area, that particular residence.

He indicates that he hears an argument, a violent argument between a man and a woman causing him concern. He goes up to investigate and – to the front door comes a lady, Ms. Rojas, who's clearly just been the [C-64] victim of some type of assault or

battery, and based upon that, I think it was the officer's duty at that point to investigate. He had to investigate.

He sees someone who has clearly just been struck, and she denies that anyone's home. She doesn't say that on the stand, but she denies to the officer, if you believe Officer Cirrito that no one's home.

And then out comes the defendant, who according to Officer Cirrito is angry, and he's yelling, "You don't have a right to be here. Get off my property. You don't have a warrant," and the officer testifies that at that point, he has enough to detain, based upon a possible domestic violence, and I think, based upon that, a protective sweep is appropriate. It's not a lengthy distance.

He tries to separate the parties, bring the defendant outside. This is not a large apartment, and he's brining the defendant outside, and what comes to the officer's attention is this rather unique tattoo on the head of the defendant, which matches the description in the calls from a robbery that happened less than two blocks away, 15 minutes earlier – I mean, half an hour earlier.

And at that point, Your Honor, I think that, you know, bringing him down to the alleyway for a field showup is entirely reasonable. I think it would be against the officer's duty as an officer if he didn't do that and conduct a field showup to see if they had the [C-65] right person. So he was properly detained first pending the domestic violence; and, second, for the 211.

And I did not find Ms. Rojas to be credible at all. She is a victim who's clearly recanting as having an

ongoing relationship with the defendant, is continuing to talk to the defendant and has animosity towards law enforcement because she believes that her children were taken as a result of this case, and I believe ultimately that's why she's so angry.

She lied at the preliminary hearing after having lengthy, eight hours of conversation with the defendant prior to that hearing, and she's continuing to lie, so much so that she's now become a defense witness. So I don't find her testimony to be credible at all.

In fact, you know, if the Court had time – and I don't think this would be the proper venue – there's recordings of her completely contradicting what she said on the stand, and the officer touched upon a few of those.

She doesn't want to be a rat or a snitch or testify against the father of her children, someone that she loves, and she was not credible. I believe she signed that consent to search form freely and voluntarily and is now having regrets because she's been talking to the defendant and is now feeling pressured.

THE COURT: Okay. Thank you.

Mr. Rowan, you get the last word, but let's keep it brief. You have two minutes.

[C-66] Mr. ROWAN: Just a couple of brief points, Your Honor.

THE COURT: I'm holding you to two minutes.

MR. ROWAN: Just to pick up on the last points that were being made. Despite these eight hours of phone calls, there wasn't a single actual statement that was ever actually pointed to to suggest that there was any impropriety in the discussions that they were having.

Also, I would just point out that I think the reasonable thing for the officer to perhaps have done under the circumstances would have been to simply continue with what he initially started to do, which was to have Ms. Rojas step outside. He could have asked her, you know, what was going on. He could have maybe gotten some actual –

THE COURT: Just because there are alternative views now doesn't mean – the beauty of 20-20 hindsight, that an officer –

MR. ROWAN: Well –

THE COURT: Let me finish.

In the heat of the moment has to necessarily apply – may not be good police tactics for a variety of other considerations. Just because you can think of alternatives doesn't necessarily make what they did a violation.

MR. ROWAN: It doesn't necessarily make it a violation, Your Honor, but ultimately the point is that, without getting – trying to get any kind of [C-67] corroboration that there actually had been a domestic incident will simply taint Mr. –

THE COURT: But they had the physical evidence standing in front of them.

MR. ROWAN: They had what they interpreted –

THE COURT: Yes.

MR. ROWAN: They had no more. They never had an actual statement from anyone.

THE COURT: Are you saying that the 4th Amendment requires certainty?

MR. ROWAN: I'm not saying it requires certainty, put there's a threshold for there to be sufficient suspicion or belief on their part.

THE COURT: An ordinary person of reasonable prudence would entertain a strong suspicion is all that's required.

MR. ROWAN: Your Honor, I think they need considerably more than that.

THE COURT: Well, the Supreme Court says you're wrong of both this state and the United States. I just quoted to you the legal standard.

MR. ROWAN: Your Honor, I would point out that, in order for them to be lawfully able to enter the premises without, you know, getting a warrant and arrest Mr. Fernandez in the apartment, I believe that they would have had, based on the case law, to have had much more than they did.

This isn't a case where they received a [C-68] call of domestic violence. They weren't, you know, told by the person that came to the door that there had been an incident of domestic violence.

All they had was – and I would remind the Court I think this is where the defense exhibits – and I would move those in, ask that they –

THE COURT: I'll receive the defense exhibits into evidence.

MR. ROWAN: But we're not talking about someone that was –

THE COURT: You can approach.

MR. ROWAN: – bloodied and battered and – we're talking about someone that was – had such serious injuries that the officers, you know, had a – any

grounds for thinking that they were, you know, in great risk at that point, and I think it takes a little more than that.

People can get injuries of that nature in any number of ways, and I don't think that the simple, you know, suspicion without any sort of corroboration that there may have been an incident of domestic violence, that that rises to the level to rush into an apartment and physically detain someone who was asserting their rights at that point.

THE COURT: Thank you, Mr. Rowan.

I'm going to deny this motion, and I'll explain why. The touchstone of the 4th Amendment is reasonable. The purposes of the 4th Amendment was to put [C-69] an end to the common law ability of courts to issue general writs, general warrants to allow officers the grounds to search anyone, anywhere at any time for any reason. That's the purpose of the 4th Amendment.

Subsequent to that, under "Terry versus Ohio," the officers are permitted to detain someone with considerably less evidence than would be required for arrest. What Officers Cirrito and the other officers knew at the time was they were conducting a robbery investigation, but they heard what they believed to be an independent – possibly an independent crime being committed. Domestic violence is a very serious matter, and the police take it very seriously.

The officers certainly had every right to go up to the door, knock and inquire as to what was going on. Ms. Rojas opened the door and talked to the officer. He saw – he had heard what sounded like a substantial verbal altercation, coupled with what appeared to the officer to be injuries.

They weren't great. You're right, Mr. Rowan. They weren't massive, but the photos clearly show she has a bit of a goose egg above her left eye, almost above her nose, and swelling on the bridge of her nose, and the photos show that.

That certainly is enough for the officer to try and find out what's going on. Then the defendant appears, angry, shouting, and certainly – for no other reason than officer safety, they could briefly detain him [C-70] to calm him down, coupled with the fact that they believe they might have a domestic violence incident.

So I think the detention was lawful, not unlawful, that they had enough under "Terry versus Ohio" and the California analogue to that case to briefly detain the defendant to investigate further and see what they had there. Did they have a domestic violence incident or not, and it was not improper to cuff him, given his demeanor.

Then, when they're removing him from the premises and taking him downstairs, still within the curtilage of the property, Officer Cirrito observes the tattoo on the top the defendant's head, and knowing what he knew from the call, it appeared that it could be the "L.A." that the victim of the robbery had reported.

Yes, Mr. Rowan, it could be interpreted other ways, but that's not a requirement. It was enough to certainly detain the defendant briefly and ask the victim to do a field showup to see if this was the person they were talking about. They came, and they identified him. At that time point, they had enough to arrest him, and that's my analysis of it.

Ms. Rojas testified – she testified. I found her believable at points and unbelievable at other points. I do believe she consented, and I asked her the very question did you think about it before you signed it? I asked her three times. Each time, she said yes.

She may have felt pressured, but pressure [C-71] does not equal duress or coercion. She felt as pressured as anyone with a cop standing in your kitchen are going to feel, but that's not against the law to constitute unlawful duress.

She signed it. Yes. She didn't like it, but she said she thought about it before she signed it. I think that's enough and then – the protective sweep, that's – you know, that's really not the right term for this. A protective sweep is for weapons usually.

And there's a recent case that says basically, when the defendant is in custody and couldn't possibly get a weapon, you can't do a protective of sweep. That's not what was going on here.

What was going on is they were trying to clear the witness to make sure there was no one else there that could hurt him. They weren't searching for anything except other persons who might be a threat to officer safety, and I believe that's permitted.

So considering all of these issues, I am denying your motion.

* * * *

PETITIONER'S BRIEF

RECORD AND BRIEFS

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No. 12-7822

IN THE

Supreme Court of the United States

WALTER FERNANDEZ,
Petitioner,

v.

CALIFORNIA,
Respondent.

On Writ of Certiorari
to the California Court of Appeal,
Second District

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QUESTION PRESENTED

Once a co-tenant has expressly told police officers that they may not enter his home, does the Fourth Amendment allow the officers to obtain valid consent to do so by removing the objecting tenant from the scene against his will and then seeking permission from the other tenant shortly thereafter?

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BRIEF FOR PETITIONER

Petitioner Walter Fernandez respectfully requests that this Court reverse the judgment of the California Court of Appeal, Second District.

OPINIONS BELOW

The opinion of the California Court of Appeal (J.A. 2-51) is published in relevant part at 208 Cal. App. 4th 100, 145 Cal. Rptr. 3d 151 (2012). The relevant order and oral explanation of the trial court (J.A. 150-52) is unpublished.

JURISDICTION

The opinion of the California Court of Appeal was issued on August 1, 2012. J.A. 2. The California Supreme Court denied petitioner's timely filed petition for review on October 31, 2012. J.A. 51. Petitioner filed a timely petition for a writ of certiorari on December 17, 2012, which this Court granted on May 20, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

In *Georgia v. Randolph*, 547 U.S. 103 (2006), this Court held that "a physically present inhabitant's express refusal of consent to a police search [of his home] is dispositive as to him, regardless of the consent of a fellow occupant." *Id.* at 122-23. The question presented in this case is whether the same holds true when the police forcibly remove an objector from the scene before seeking permission to search from the fellow occupant. The California Court of Appeal held that *Randolph* does not apply in this situation – reasoning that the once the police elect to remove an objector against his will, they nullify the legal effect of his invocation of his constitutional right to privacy in his home.

1. One morning in 2009, Abel Lopez was robbed, cut with a knife, and then assaulted on a street corner in Los Angeles. The lead assailant was a man with light skin, a grey sweater, and a tattoo on his bald head. When this assailant confronted Lopez, he told Lopez that he was in his territory and that "D.F.S. rules here." J.A. 5. He then cut Lopez's wrist and, after being joined by three or four other men, knocked Lopez to the ground and hit and kicked him.

A police dispatcher summoned two officers to the scene, indicating a possible gang-related assault. The officers made their way to an alley where they knew that D.F.S., or "Drifters," gang members sometimes gathered. A person told the officers, "He's in there. He's in the apartment." J.A. 6. Immediately thereafter, the officers saw someone with a blue t-shirt run through the alley and into the apartment (one of several within a house), where the witness had been pointing. A moment later, the

officers heard sounds of yelling and fighting coming from within the apartment.

The two officers, along with three others who had arrived as backup, proceeded to knock on the door of the apartment, which was the domicile of petitioner, his girlfriend (Roxanne Rojas), the couple's two-month-old daughter, and Rojas's four-year old son. Rojas answered the door. She was holding the baby and crying. She had fresh bump on her nose, as well as some blood on her hand and shirt. In response to the officers' questions, Rojas explained that she had been in a fight.

Just as the officers asked Rojas to step outside so that they could continue their investigation, petitioner – who had a shaved head with a tattoo – stepped forward inside the kitchen. Dressed only in boxer shorts and sweating, he said, "You don't have any right to come in here. I know my rights." The officers then took a few steps into the home and physically "removed [petitioner] from the residence and took him into custody." J.A. 6. The officers led petitioner to the rear of the house, formally arrested him, and then hauled him down the stairs. Meanwhile, other officers conducted a protective sweep of the apartment and confirmed that no one else was there.

After removing petitioner from his residence, the police took him to participate in a field showup with Lopez, the robbery victim. Lopez identified him as the lead assailant. One of the officers then took petitioner to the stationhouse for booking.

Meanwhile, two officers returned to petitioner's apartment. About one hour had passed since petitioner's arrest, J.A. 81, and Rojas and the

children were still there. The officers separated Rojas and her son and began asking each about the altercation that had transpired in the apartment earlier. The officers also asked whether petitioner was affiliated with the Drifters. When Rojas objected to her son being questioned separately, one officer rebuffed the complaint, telling her that their investigation was "going to determine whether or not we take your kids from you right now or not." J.A. 93. Rojas then dropped the issue.

The four-year-old told the police that when petitioner had returned home earlier that day, he had fought with Rojas and hit her. According to the police, Rojas told them the same thing. 3 R.T. (Reporter's Transcript of Proceedings) 1335. Rojas testified at trial, however, that petitioner had never hit her. 3 R.T. 1272. Rather, she said that she had obtained her injuries during an earlier confrontation with a woman named Vanessa – an altercation that arose over Vanessa's flirting with petitioner. 3 R.T. 1258-62, 1287.

About 20-30 minutes into the police's questioning of Rojas, an officer "pulled out a paper for [her] to sign." J.A. 99. The paper was a consent-to-search form. According to Rojas, the officer "said we need you to sign this paper right here because, if not, if you don't give us consent, he said we could get a judge to do a search" – "to sign for a search." J.A. 100. Rojas "didn't want to sign" the form, but she did so anyway. *Id.* As she later explained, "I just wanted it to just end so I signed it." *Id.*

The officers then searched the apartment for a few hours. J.A. 94. They never sought or obtained a warrant. Among other things, the officers found and

seized a shotgun and ammunition; a knife allegedly used in the robbery; a grey sweater petitioner allegedly was wearing at the time of the robbery; a light blue shirt like the one the police had seen on a suspect running near the crime scene; and other clothing allegedly indicative of gang membership.

2. The State charged petitioner with second degree robbery; corporal injury on a child's parent; and three counts of illegally possessing firearms and ammunition. Petitioner responded by moving to suppress the evidence the police obtained during their warrantless search of his apartment.

The trial court held an evidentiary hearing and then denied the motion. Finding Rojas's testimony "believable at points and unbelievable at other points," the court ruled that it was "enough" to validate the search that she signed the consent-to-search form after petitioner had been arrested and removed from that scene. J.A. 152. The court continued: "She may have felt pressured, but pressure does not equal duress or coercion. She felt as pressured as anyone with a cop standing in your kitchen are [sic] going to feel, but that's not against the law to constitute duress." *Id.* The trial court never mentioned the fact that petitioner had equal property rights in the dwelling and had expressly objected to any warrantless search of his home.

A few months later, petitioner pleaded nolo contendere to the three firearms and ammunition charges, while effectively reserving his right to appeal the denial of his suppression motion as to

those claims.[1] After a trial on the remaining charges at which the prosecution introduced the knife, sweater, shirt, and allegedly gang-related clothing against petitioner, a jury found him guilty of the robbery and inflicting corporal injury. The jury also found that petitioner had used a deadly weapon while committing the robbery and committed that crime for the benefit of, or in association with, a criminal street gang. In light of these special findings, the court sentenced petitioner to fourteen years in prison on the robbery count. The court also imposed a three-year sentence for the corporal injury conviction and a two-year sentence for the firearms and ammunition convictions, both to run concurrently with the robbery sentence. J.A. 15.

3. The California Court of Appeal affirmed the robbery, firearms, and ammunition convictions. J.A. 50.[2]

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[1] Under California law, a defendant "must 'be given the option of setting aside his plea'" if he shows on appeal that a trial court erred in declining to suppress relevant evidence obtained through an unconstitutional search. *People v. Galland*, 116 Cal. App. 4th 489, 495 (2004) (quoting *People v. LeBlanc*, 60 Cal. App. 4th 157, 169-70 (1997)). Obviously, the shotgun and ammunition that the police found during their search of petitioner's home were relevant to his conviction on the firearms and ammunition charges.

[2] The corporal injury conviction is now final as well. The Court of Appeal "conditionally reversed" that conviction and directed the trial court to review certain evidence in chambers to determine whether to reopen that count. J.A. 49. But on remand, the trial court ruled that the evidence did not warrant reopening the count. The court thus reinstated the conviction, *see* Minute Order Oct. 25, 2012, and petitioner did not appeal

As is relevant here, the Court of Appeal held that the trial court correctly refused to suppress the evidence seized during the warrantless search of petitioner's home. The Court of Appeal noted that under *Georgia v. Randolph*, 547 U.S. 103 (2006), the police cannot obtain valid permission from a co-occupant of a house to enter without a warrant when another co-occupant is physically present at the scene and expressly refuses to consent. And the Court of Appeal acknowledged that the Ninth Circuit has applied *Randolph* to hold that the police likewise cannot obtain valid consent to conduct a warrantless search of a home when, as here, a physically present resident refused to consent but the police arrested and removed him from the scene before asking another resident for consent. J.A. 22 (citing *United States v. Murphy*, 516 F.3d 1117 (9th Cir. 2008)). But the Court of Appeal sided with other federal courts that have held that physical presence is "determinative" under *Randolph*, even when the police have removed a previously present objector from the residence against his will. J.A. 31-32. Under this supposedly "clear" and "simple" rule, once the police take an objector away from his home, his refusal of consent becomes meaningless and the police may obtain valid consent from another resident with no greater authority over the premises. J.A. 32.

4. Petitioner sought discretionary review in the California Supreme Court, renewing his Fourth

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that order. Thus, all that remains in this litigation is the federal question this Court has granted certiorari in order to resolve.

Amendment claim. That court denied review without comment. J.A. 51.

5. This Court granted certiorari. 133 S. Ct. 2388 (2013).

SUMMARY OF ARGUMENT

Where, as here, a physically present resident of a home expressly objects to the police entering his dwelling, the police do not nullify the legal effect of that objection by arresting and removing him from the scene.

I. At the moment petitioner told the police that they could not enter his home without a warrant, this Court's holding in *Georgia v. Randolph*, 547 U.S. 103 (2006), dictated that the police could not simply turn to his girlfriend to obtain valid permission to conduct a search for evidence. Petitioner had equal claim to authority over the property; he was physically present; and he was clearly and directly denying the police leave to enter his home.

Randolph equally dictates that the police did not obtain license to ignore petitioner's objection when they arrested and removed him from his home. *Randolph* instructs that once a physically present resident has put the police on notice that he objects to their entry, "a resolution must come through voluntary accommodation" between the objector and any cooperating cotenant, not through unilateral action by the cotenant. *Id.* at 114. That is, an objection triggering *Randolph* remains in effect until officers learn that *the objector* no longer wishes to keep the police out of his home. At the very least, this must be so where the police themselves are responsible for the objector's inability to remain

present and thus physically opposed to any warrantless entry. Any other rule would make a mockery of *Randolph*.

It also bears emphasis that – even more so than in *Randolph* – there is no need under these circumstances to strain consent law to ignore the defendant's timely objection to searching his home for evidence without a warrant. The factual basis for an arrest usually provides probable cause for a warrant to search the arrestee's house for evidence. The police can obtain warrants quickly (within hours or even minutes), and can remove residents from a house and seal it off while they do so. Alternatively, police officers unwilling or unable to obtain warrants can still obtain other kinds of helpful assistance from cooperating residents.

II. The California Court of Appeal nonetheless insisted, for two reasons, that a *Randolph* objection becomes meaningless once the objector is no longer physically present. Neither proffered justification for such a rule withstands scrutiny.

First, allowing a *Randolph* objection to retain legal force after an arrest and removal avoids administrative difficulties, rather than creating them. If the police procure a warrant, as they should in the vast majority of such situations, any objection is irrelevant. And even when the police do not to seek a warrant, all they have to do after receiving an objection is obtain assurance – either from the objector or any other tenant with apparent authority – that the objector no longer wishes to deny them entry. Officers and courts can easily manage this requirement.

By contrast, the Court's of Appeal's continuing presence test would raise vexing questions. It is anyone's guess, for example, whether someone remains "present" after asserting an objection if he excuses himself to take a phone call, or if he leaves that evening for five minutes to pick up take-out for dinner. What if, after a resident has asserted his objection, an officer asks him to step outside and into a squad car to talk things over, while another officer approaches a co-tenant in the doorway? Or what if police officers arrest and remove an objector with probable cause to do so, but really for the purpose of nullifying his objection? The Court of Appeal's mantra of "presence" offers no easy way to deal with such scenarios – even though Fourth Amendment doctrines are supposed to give officers clear directives and to minimize opportunities for manipulation.

Second, allowing a *Randolph* objection to retain legal force after an arrest and removal would not frustrate "the law enforcement prerogatives recognized by *Randolph*," J.A. 32. The *Randolph* doctrine is meant to separate scenarios where there is an "absence of reason to doubt" that one tenant's consent is good against the others from those scenarios in which the police should not assume that a consenting tenant speaks for his fellow residents. 547. U.S. at 112. When an occupant of a dwelling consents to a search and no one else is around, police may rely on that permission because "[t]here is no ready reason to believe" in many cases that tracking down and asking other residents whether they also consent would make a difference. *Id.* at 122. But where, as here, a resident with self-interest in objecting is in fact at the door and objects, the police clearly know that a tenant wishes to refuse them

entry into the dwelling. And that knowledge does not dissipate if the police arrest the objector (or otherwise reposition him away from his doorway). To the contrary, the police in these circumstances continue to have strong reason to believe that any subsequent invitation from another resident is "disputed," *id.* at 113, and that reality is dispositive here.

ARGUMENT

I. When A Person Objects To The Police Entering A Home He Shares With Another, The Police Do Not Negate The Legal Effect Of That Objection Simply By Arresting And Removing Him From The Scene.

At the moment petitioner told the police that they could not enter his home to search for evidence without a warrant, this Court's holding in *Georgia v. Randolph*, 547 U.S. 103 (2006), dictated that the police could not simply turn to his girlfriend to obtain valid permission to conduct such a search. And if this Court's precedent means anything, it likewise dictates that the police did not nullify the legal effect of petitioner's invocation of his constitutional right against a warrantless search of his home simply by arresting and removing him from the scene.

A. Petitioner's Refusal To Allow The Police To Enter Without A Warrant Triggered His Rights Under *Georgia v. Randolph*.

1. We begin with *Randolph*. In that case, a woman called the police after a domestic dispute. When officers arrived at her home, she told them that her husband (Randolph) was a cocaine user and that

"items of drug evidence" were in the house. 547 U.S. at 107. One officer then asked Randolph, who was also present, "for permission to search the house." *Id.* "[H]e unequivocally refused." *Id.* The officer immediately turned to his wife and asked her for consent to search. When she provided that consent, the officers entered without a warrant and found evidence later used to prosecute and convict Randolph of drug crimes.

This Court held that this search violated the Fourth Amendment because "a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant." *Id.* at 122-23. This Court based this holding on three primary rationales.

First, this Court emphasized the "special protection" the Fourth Amendment accords to the home "as the center of the private lives of our people." *Id.* at 115 (quoting *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J. concurring)). "At the [Fourth] Amendment's 'very core' stands 'the right of a man to retreat into his own home and be free from unreasonable governmental intrusion.'" *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)); *United States v. U.S. Dist. Court for the E.D. Mich.*, 407 U.S. 297, 313 (1972) ("physical entry of the home" is the "chief evil against which . . . the Fourth Amendment is directed"). Thus, it is an "ancient adage that a man's house is his castle [to the point that t]he poorest man may in his cottage bid defiance to all the forces of the Crown." *Randolph*, 547 U.S. at 115 (quoting *Miller v. United States*, 357 U.S. 301, 307 (1958)) (internal quotation marks omitted).

Second, this Court recognized "the great significance" that the Fourth Amendment gives to "widely shared social expectations." *Randolph*, 547 U.S. at 111; *see also Jardines*, 133 S. Ct. at 1416 (stressing importance of "background social norms"). And applying those expectations to the situation at hand, this Court explained that "a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out.'" *Randolph*, 547 U.S. at 113.

This Court conceded when callers seek and obtain consent from a cotenant with authority to give it, social norms do not require the callers to take "affirmative steps" to test validity of that consent against other residents who are absent and have never spoken up. *Id.* at 122. People who share residences with others assume the risk that "any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another." *Id.* at 111 (internal quotation marks omitted). Consequently, the police may rely on a cotenant's permission to search a shared home without asking another tenant asleep in a bedroom, *see Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990), or in a nearby squad car, *see United States v. Matlock*, 415 U.S. 164, 169-71 (1974), whether they also consent.

But when, as in *Randolph* and here, a resident is present during "the threshold colloquy" with the police and objects to any warrantless entry, "the question [is] whether customary social understanding accords [a] consenting tenant authority powerful enough to prevail over the co-tenant's objection."

Randolph, 547 U.S. at 121. This Court concluded in *Randolph* that it does not. Once "a potential defendant with self-interest in objecting is in fact at the door and objects," the resolution of any disagreement between the residents on this score "must come through *voluntary accommodation*" between the cotenants. *Id.* at 114, 121 (emphasis added). That is, any consent under these circumstances must be a product of communication between the cotenants and include a voluntary decision on the part of the objector to allow the others' wishes to prevail. *Id.* at 114.

Third, this Court stressed in *Randolph* that law enforcement can generally achieve legitimate public safety objectives "without relying on a theory of consent that ignores an inhabitant's refusal to allow a warrantless search." *Id.* at 116. Police, for example, typically may obtain warrants to search the homes of suspected wrongdoers and can enter them without warrants (and without consent) when necessary to prevent the destruction of evidence or to quell domestic disturbances. *See, e.g.*, *Brigham City v. Stewart*, 547 U.S. 398, 403 (2006). And a cotenant "acting on his own initiative may be able to deliver evidence to the police" or otherwise provide helpful information. *Randolph*, 547 U.S. at 116. But "the Fourth Amendment's traditional hostility to police entry of a house without a warrant" renders a search unlawful when, as Justice Breyer put it, the police wished to search "solely for evidence"; they "did not justify their search on grounds of possible evidence destruction"; a resident was "present and made his objection known clearly and directly to the officers seeking to enter the house"; and "the officers" faced with this objection "might easily have secured the

premises and sought a warrant permitting them to enter." *Id.* at 125-26 (concurring opinion).

2. When petitioner told the police that they could not enter his home, he stood in exactly the same position as the defendant in *Randolph*. Petitioner had equal claim to authority over the property; he was physically present; and he was clearly and directly denying the police leave to enter his home. To the extent the police believed that entry was necessary to quell a domestic disturbance, they had authority to enter (and, in fact, briefly did so) to address that concern. *See id.* at 118; J.A. 6. But pursuant to *Randolph*, petitioner's invocation of his constitutional rights during the "threshold colloquy" denied the police at that moment the authority to enter without a warrant "to search for evidence." 547 U.S. at 118, 121.

The only question in this case, therefore, is whether the police negated that legal effect of petitioner's express denial of consent when they arrested and removed him from the premises – thereby enabling them to return one hour later and obtain valid consent from his cotenant. We now turn to that question.

B. The Legal Import Of Petitioner's Objection Was Not Nullified By His Arrest And Removal From The Scene.

The California Court of Appeal held that when the police returned after arresting petitioner and removing him from the premises, they obtained valid consent from petitioner's girlfriend notwithstanding his earlier objection because he was no longer "present" to enforce his rights. J.A. 31-33. This holding is incompatible with *Randolph*. Not only did

petitioner's interest in the privacy of his home remain identical after his arrest to Randolph's, but the social norms governing petitioner's situation and the law enforcement interests at stake were indistinguishable as well. Indeed, allowing police to negate the legal effect of an objection that triggers *Randolph* by removing the objector from the premises would make a mockery of this Court's precedent.

1. A Person Who Is Removed From His Home Against His Will Retains The Same Privacy Interest In His Home As When He Was Present.

A person's interest in the privacy of belongings he keeps inside his home does not diminish when he is away from his dwelling. It is thus a basic postulate of Fourth Amendment law that even when the police take someone into custody, "no search of his house [can be] made without a search warrant" or valid consent. *Chimel v. California*, 395 U.S. 752, 767 (1969); *accord Shipley v. California*, 395 U.S. 818, 819-20 (1969) (per curiam). Accordingly, nothing about petitioner's arrest and removal from his home lessened the legitimacy or force of his interest "against the government's intrusion into his dwelling place." *Randolph*, 547 U.S. at 115.

2. The Same Customary Social Norms That Informed This Court's Decision In *Randolph* Would Have Caused A Caller Here To Doubt He Had Permission To Enter.

The social norms governing the police's return to petitioner's home did not differ in any meaningful way from those in play in *Randolph* either. When a homeowner has expressly denied a caller leave to enter his dwelling and the caller returns shortly thereafter, social norms do not give that caller confidence that he may rely solely on another resident's permission to enter. Rather, as this Court indicated in *Randolph* itself, a typical caller will continue to doubt that he genuinely has permission to enter unless and until he is assured that *the objector* no longer wishes to deny him entry. This is especially so where, as here, the caller himself created the objector's absence from the home before returning and seeking the other resident's consent.

a. Once a resident objects to a caller's entry, customary social norms give the caller reason to doubt he has permission to enter the dwelling until the caller obtains assurance, either directly from the objector or from the co-tenant, that the objector no longer seeks to keep the caller out of the house. This social understanding follows directly from *Randolph*'s holding that once a physically present occupant objects to a caller's entry, "a resolution must come through voluntary accommodation," 547 U.S. at 114 – that is, through a voluntary decision on the part of the objector to relent. That being so, the only way for a caller's initial hesitation in the face of an objection to his entry to dissipate is for the caller to obtain

assurance of one form or another that *the objector* has decided that he no longer insists on keeping caller out of the house.

This social understanding is particularly vital in the context of police-citizen interactions. "In a society based on law, the concept of agreement and consent [to police action] should be given a weight and dignity of its own. . . . It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding." *United States v. Drayton*, 536 U.S. 194, 207 (2002). This reinforcement mechanism requires the police to afford dignity not only to affirmative agreements but also to *refusals* to consent (which might also be thought of as invocations of constitutional rights) as well. *Cf. Salinas v. Texas*, 133 S. Ct. 2174, 2179 (2013) (highlighting the importance of "express invocation[s]" of constitutional right against self-incrimination during interactions with police officers); *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (same regarding right to counsel). When the police attempt to circumvent such refusals, they undermine not just social norms, but also individual dignity and the rule of law. All the more so when the police take such steps within the very hour of an objection.

Petitioner's invocation of his rights is also what distinguishes this case from *Matlock*, where the police arrested and removed a person from his home before seeking consent to search from his cotenant, but the person never told the police he did not want them to enter his home. *See* 415 U.S. at 166. If a tenant never tells the police he does not want them to enter his house, he "assume[s] the risk" that other

tenants will allow them to look inside. *Id.* at 169-71. But when a person clearly and directly invokes his right to privacy in his home, he expressly notifies the police that they may not fairly impute any cotenant's consent to him without some reason to believe that he no longer objects to their entry.

b. Even if, as a general matter, a police officer returning shortly after a resident denied him entry could obtain valid consent simply by getting permission to enter from the other resident, surely social norms do not allow an officer to rely on such permission when the police themselves create the objector's absence. When the police arrest an objector or otherwise remove him from the scene, they are responsible for his inability to remain present and thus physically opposed to any warrantless entry.

Equally important, the police under these circumstances make it impossible for the arrestee to reach any "voluntary accommodation," *Randolph*, 547 U.S. at 114, with his co-tenant concerning the police's wishes to search his house. At least for some period of time, a person who has been forcibly removed from his home cannot communicate with his co-tenant to discuss whether to allow the police inside. Forced removal and continuing incapacitation also prevents an objector from taking any unilateral steps that a person might typically take in this situation to protect the privacy of his belongings – for example, locking up personal items, removing them from the premises, or even moving out and finding a new place to live.

Put another way, a person such as petitioner whom the police have arrested and removed from his home after he has unequivocally asserted his Fourth

Amendment rights cannot possibly be said to have voluntarily "assumed the risk" that the other co-tenant, despite his wishes, would allow the police to enter and rummage through his private belongings. *Matlock*, 415 U.S. at 171. "He has not assumed the risk that his co-tenant may subsequently admit the visitor, because all choice has been taken away from him in his involuntary removal from the premises." *United States v. Henderson*, 536 F.3d 776, 787-88 (7th Cir. 2008) (Rovner, J., dissenting); *see also Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring in result) ("The Constitution guarantees . . . a society of free choice. . . . Such a society presupposes the capacity of its members to choose."). Accordingly, at least "where the police are responsible for the objecting tenant's removal from the premises, his objection ought to be treated as a continuing one" unless and until he changes his mind. *Henderson*, 536 F.3d at 787 (Rovner, J., dissenting).

3. Just As In *Randolph*, The Police In These Circumstances Had Alternative Means To Achieve Any Legitimate Public Safety Objectives.

Just as in *Randolph*, there is no need under the circumstances here to strain consent law ignore the defendant's timely objection to searching his home for evidence without a warrant. Indeed, even more so than in *Randolph*, other Fourth Amendment doctrines ensure here that the police can meet any legitimate public safety objectives.

In most instances in which police arrest someone, it will be easy for them to obtain a warrant to search the arrestee's home, thereby rendering any

objection from the arrestee's irrelevant. (This, of course, is how police officers already customarily proceed whenever they arrest someone who lives alone.) That is because the same "probable cause" that allows a person's arrest, *see Devenpeck v. Alford*, 543 U.S. 146, 152 (2004), usually provides "probable cause" for the police to get a warrant to search the arrestee's house for evidence, U.S. Const. amend IV. A warrant, therefore, was almost certainly attainable here and would have obviated any need for consent.

It might sometimes take longer to obtain a warrant than consent from a remaining homeowner, but that is no matter. Once the police have arrested and removed a suspect from his home, the risk that remaining residents will seek to conceal or destroy evidence while the officers procure a warrant is minimal. It is much more likely that remaining residents will steer the straight and narrow "to deflect suspicion raised by sharing quarters with a criminal," or simply to carry out their civic and legal duties to avoid interference with police investigations. *Randolph*, 547 U.S. at 116.

But if time is of the essence because the police fear that remaining occupants may seek to conceal or to destroy evidence, the police have numerous tools at their disposal. For one thing, warrants are available nowadays not only through traditional methods but also "remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing." *Missouri v. McNeely*, 133 S. Ct. 1552, 1562 (2013). Hence, as this Court observed last Term, police can obtain warrants quite expeditiously

– when necessary, within hours or even minutes. *See id.* at 1561-62, 1567 n.11. Furthermore, under *Illinois v. McArthur*, 531 U.S. 326, 331 (2001), the police can seal off the premises (that is, take all occupants outside and refuse to let anyone else in) while they wait for the warrant to issue. Lastly, if the police – notwithstanding all of these available steps – need to enter a home immediately in order "to prevent the imminent destruction of evidence," the exigent circumstances doctrine allows them to do so without seeking any warrant at all (or obtaining homeowner consent). *Brigham City v. Stewart*, 547 U.S. 398, 403 (2006); *accord Kentucky v. King*, 131 S. Ct. 1849, 1856-57 (2011). The same is true if the police need "to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Brigham City*, 547 U.S. at 403.

Even when police officers lack probable cause (and exigent circumstances are not present), law enforcement officers *still* have ample means, besides relying on disputed consent, to further legitimate interests. The police, for instance, can ask a non-objecting co-tenant to "tell the police what he knows, for use before a magistrate in getting a warrant." *Randolph*, 547 U.S. at 116. In addition, "[t]he co-tenant acting on his own initiative may be able to deliver evidence [directly] to the police." *Id.*; *see also Coolidge v. New Hampshire*, 403 U.S. 443, 487-89 (1971) (suspect's wife retrieved his guns from the couple's house and turned them over to the police).

All of these alternative avenues leave the question presented here making a difference only where the police have arrested someone but (i) they do *not* have probable cause to believe any evidence is

inside the house; (ii) there are *no* safety or medical considerations warranting immediate entry; and (iii) *no* remaining residents give any reason to believe that the house contains any evidence of criminality. That is exactly when an objector's right to exclude the police from his most private spaces is at its zenith and government's "need for such searches," *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973), is at its nadir. It thus is perfectly natural that the individual right to privacy would prevail here.

4. Allowing Involuntary Removals To Negate Objections To Police Entry Would Make A Mockery Of *Randolph*.

The California Court of Appeal's holding that an objector's continued presence is "indispensible" to preserving his right to prevent warrantless searches of his home, J.A. 33, would drain *Randolph* of genuine meaning or effect.

a. In *Randolph*, this Court acknowledged that there is some "formalism" involved in distinguishing between (i) a resident's acquiescence to a warrantless entry and search when no one else is present and (ii) a resident's acquiescence while another resident is present and objecting to such police action. 547 U.S. at 122. But this formalism has real substance behind it. When the only person the police ask for consent readily gives it and no one else is around, "[t]here is no ready reason to believe that efforts [to track down absent residents] to invite a refusal would make a difference in many cases." *Id.* By contrast, when "a potential defendant with self-interest in objecting is in fact at the door and objects" to a police request to enter, the police know that they are not welcome in

the dwelling. *Id.* at 121. In other words, the *Randolph* doctrine is meant to separate scenarios where there is an "absence of reason to doubt" that one tenant speaks for the others when he consents from those scenarios in which the police have good reason to doubt that the consenting tenant does so. *Id.* at 112.

The California Court of Appeal's exclusive focus on an objector's continued presence turns a blind eye to this distinction. Under a rule requiring continuing presence, the police presumably could return and get valid consent from an acquiescing resident as soon as the objector leaves to go to work or to pick up take-out for dinner. Indeed, the police could go sit in their squad car by the curb and – instead of phoning in for a warrant – simply wait for the objector to go upstairs to go to bed or to take a shower. No serious argument could be made under any of these scenarios that the police, upon returning to the front door, could think that the resident's objection had dissipated and that the remaining resident was speaking for both tenants. Yet through just a little bit of gamesmanship the police would be able to eviscerate the impact of any *Randolph* objection.

Worse yet, whenever, as here, the police have grounds to arrest and remove tenant, the Court of Appeal's continuous presence rule would not even require the police to leave the doorstep in order to cancel out an objection to their entry. The same would be true whenever the police merely have grounds (as they nearly always do) to physically reposition an objecting tenant away from the doorway, in order to exert "unquestioned command" over the investigative situation, *Michigan v.*

Summers, 452 U.S. 692, 703 (1981); *see also Maryland v. Wilson*, 519 U.S. 408, 414-15 (1997). Even if the police were to arrest or reposition an objector solely in order to enable a warrantless search of his home, the resulting search would presumably be valid so long as the officers had legal authority to detain the objector and a co-tenant consented after the arrest.

To be sure, this Court suggested in *Randolph* that the Fourth Amendment might not tolerate the police's "remov[ing] the potentially objecting tenant from the entrance for the sake of avoiding a possible objection." 547 U.S. at 121. But even if such motivation would void a tenant's subsequent consent when the police lacked any valid reason to take the cotenant into custody, this Court has consistently shunned such "subjective" inquiries whenever, as here, objectively legitimate grounds exist to detain someone. *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (arrest); *see also Whren v. United States*, 517 U.S. 806, 813 (1996) (temporary detention); *see generally King*, 131 S. Ct. at 1859 (subjective inquiries into police motivations are "fundamentally inconsistent with our Fourth Amendment jurisprudence"). This precedent strongly suggests – and the State has not thus far denied – that anytime the police have grounds to arrest (or otherwise remove) an objector, the Court of Appeal's rule would allow the police purposely to render the objector's prior assertion of his *Randolph* rights meaningless. Surely this Court's decisions – not to mention a person's express invocation of his constitutional rights – are entitled to more respect and practical import than that. *Cf. Missouri v. Seibert*, 542 U.S. 600 (2004) (invalidating police practice devised for

the purpose of circumventing the requirements of *Miranda*).

II. Neither Of The California Court Of Appeal's Reasons For Holding That *Randolph* Objections Are Extinguished Upon Arrest And Removal Has Merit.

The California Court of Appeal resisted crediting petitioner's express invocation of his constitutional rights in this case – opting instead to hold that *Randolph* ceases to apply once an objector is no longer "present" – for two reasons. First, the Court of Appeal opined that allowing *Randolph* objections to retain legal force after arrests and removals would pose administrative difficulties, while asserting that the rule it adopted "is a clear one" that hinges on the "simple" concept of "presence." J.A. 32 (internal quotation marks and citation omitted). Second, the Court of Appeal asserted that dispensing with presence as a requirement for enforcing one's *Randolph* rights would "permit[] a one-time objection by one cotenant to permanently disable the other [cotenant] from *ever* validly consenting to a search of their shared premises." J.A. 33 (internal alterations in original; internal quotation marks and citation omitted). Neither of the Court of Appeal's contentions withstands scrutiny.

A. Allowing A *Randolph* Objection To Retain Legal Force After An Arrest And Removal Avoids Administrative Difficulties, Rather Than Creating Them.

The California Court of Appeal suggested that applying *Randolph* after an arrest and removal would pose practical difficulties because it would always

"requir[e] officers who have already secured the consent of a defendant's cotenant to also secure the consent of an absent defendant." J.A. 32-33. But this suggestion misunderstands petitioner's argument. Petitioner concedes – and this Court has already made clear – that officers need not take "affirmative steps" to confirm a resident's authority to consent to a search merely because the resident lives with others (even if one of those others is in custody in a nearby squad car). *Randolph*, 547 U.S. at 122; *see also Matlock*, 415 U.S. at 169-71. Rather, petitioner maintains merely that after a resident has *expressly refused* to give consent, then officers may not conduct a warrantless search of the dwelling for evidence without obtaining assurance from the objector or another resident that the objector no longer objects to a warrantless search of his home. In other words, petitioner seeks only to require the police to treat a refusal to consent with the dignity that social and constitutional norms require.

Such an obligation would be neither confusing nor difficult to abide. The police already regularly seek and obtain various kinds of waivers from suspects in custody, as well as from those whom they have released from custody. It thus would not be hard for officers to ask suspects who previously objected to warrantless searches of their homes to reconsider that stance or to memorialize such reversals when obtained. Alternatively, the police could simply ask any other resident whether the previous objector still wished to deny the police entry. If the consenting resident assured the police that the other one no longer objected, this Court's holding in *Rodriguez* dictates that the police could reasonably rely on that assurance to proceed. *See* 497 U.S. at

182 (officers may rely on representations from anyone whom they have a reasonable belief has authority to give them). In short, administering *Randolph* after arresting an objector turns on nothing more than applying rules that already govern police-citizen communication in numerous settings.

Implementing the California Court of Appeal's continuous presence rule, by contrast, would be neither "clear" nor "simple," J.A. 32. In particular, the meaning of the word "present" in this context is not readily apparent or easy to pin down. Does an objector remain "present" if he excuses himself after he has asserted his objection to use the restroom? To take a phone call? What if, after a resident has asserted his objection, he steps outside onto the front lawn to talk to one officer while another officer approaches a co-tenant in the doorway? The Court of Appeal's mantra of "presence" offers no easy way to deal with such questions, even though they are sure to arise with regularity and to require just the sort of "highly fact specific" assessments and "ad hoc determinations on the part of officers in the field and reviewing courts" that the police and courts typically detest in the context of the Fourth Amendment, *Thornton v. United States*, 541 U.S. 615, 623 (2004). *See also New York v. Belton*, 453 U.S. 454, 458 (1981) (eschewing rules that require "the drawing of subtle nuances and hairline distinctions" because they "may be literally impossible of application by the officer in the field") (internal quotation marks and citation omitted)).

Worse yet, the Court of Appeal's continuing presence requirement would be subject to easy manipulation. If, for example, a court made clear

that an objector's abandonment of the doorway in favor of his front lawn terminated his "presence," then police officers could defeat *Randolph* objections simply by asking objectors to have a chat outside in the yard or next to the squad car. Such tactics would do nothing to generate a higher degree of certainty that another resident's permission to enter would accord with the objector's wishes. To the contrary, police would almost certainly know that they were asking the other resident to do something that his cotenant did not want to allow. But under the Court of Appeal's rule, the police would have no reason to care. Through a little bit of stage direction, officers could always evade any legal effect of a person's objection to a warrantless search of his home.

None of this is to deny that the *Randolph* opinion emphasized the objector's presence in that case, "'repeatedly refer[ring] to an "express refusal of consent by *a physically present* resident."'" J.A. 25 (quoting *United States v. Hudspeth*, 518 F.3d 954, 960 (8th Cir. 2008) (quoting in turn *Randolph*, 547 U.S. at 120)) (emphasis added by Eighth Circuit). But that prerequisite was satisfied here; indeed, it is satisfied whenever the police go to someone's home and someone inside denies them consent to entry. The question here involves what follows from that physically present resident's denial. Must the police respect the objector's denial unless he changes his mind, or may the police ignore the denial once the objector is no longer technically "present"? The *Randolph* opinion dictates the former rule, instructing that once a tenant denies the police entry, "a resolution must come through voluntary accommodation" between the cotenants, not by unilateral consent from another tenant. 547 U.S. at

114. This directive both tracks social custom and avoids daunting administrability issues.

B. Allowing A *Randolph* Objection To Retain Legal Force After An Arrest And Removal Does Not Permanently Disable The Police From Ever Obtaining Valid Consent From A Co-Tenant.

As explained above, the facts giving rise to probable cause to arrest a suspect will usually provide grounds for obtaining a timely warrant to search the arrestee's dwelling, thus rendering immaterial any objection the arrestee or any other resident may have to the search. See supra at 20-21. Thus, identifying the circumstances under which the police may obtain valid consent from a non-objecting resident after arresting another resident who objected to a warrantless search is, for all practical purposes, a largely academic issue. Even so, the police still have numerous options apart from seeking a warrant.

For one thing, the police can talk to the arrestee after he has initially objected and seek his consent. Many people, even after being arrested, decide once they cool down that it is in their best interest to assist in police investigations. And if the arrestee consents, then the police can return to the residence and, with the permission of the other resident, conduct a search of the dwelling.

Alternatively, the police can seek to enlist the cooperative resident in their cause. By giving that resident an opportunity to speak with the objector, the police could enable the two residents to agree to allow the police to conduct a warrantless search.

Furthermore, as noted *supra* at 22, the non-objecting resident might also be willing to share information that makes it easier for the police to obtain a warrant, *see Randolph*, 547 U.S. at 116 – or that persuades them that they no longer want to search the home after all. Finally, the other resident "acting on his own initiative may be able to deliver evidence [directly] to the police." *Id.*

The only thing the police may *not* do is completely ignore an arrestee's objection to a warrantless search – treating it as nullified once officers have involuntarily removed him from the scene. The privacy the Fourth Amendment guarantees in the home, and the dignity our legal system affords to assertions of constitutional rights, demand that once a resident objects to police entering his dwelling, officers may not conduct a warrantless search for evidence unless they obtain a warrant or some sort of assurance that the resident no longer objects. Anything less would not only disserve constitutional values but flout this Court's precedent.

CONCLUSION

For the foregoing reasons, the judgment of the California Court of Appeal should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

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WALTER FERNANDEZ,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Writ Of Certiorari To The California Court Of Appeal Second Appellate District

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QUESTION PRESENTED

Whether petitioner's objection to police entry into his shared apartment barred the police from later conducting a warrantless search of the apartment based on the consent of his cotenant obtained after petitioner had been removed from the premises for a domestic violence investigation and then lawfully arrested for a prior robbery.

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STATEMENT OF THE CASE

Petitioner Walter Fernandez was charged with: armed robbery of Abel Lopez; domestic abuse of petitioner's girlfriend and cotenant, Roxanne Rojas; and illegal possession of a firearm and ammunition. The armed robbery charge was based on evidence that petitioner, a member of the Drifters criminal street gang, approached Abel Lopez on the street, issued a gang challenge, and tried to stab him. When Lopez resisted, petitioner called to some accomplices, who helped him subdue and rob the unarmed victim. The domestic abuse and possession charges were based on police officers' observations at petitioner's apartment at the time of his initial detention and their later warrantless search of that apartment with Rojas's consent.

Prior to his trial, petitioner moved to suppress the evidence—a sawed-off shotgun, ammunition, and a knife—seized during the warrantless search of the apartment following his arrest.

1. The evidence at the suppression hearing showed the following: At 12:15 p.m. on October 12, 2009, police officer Joseph Cirrito and his partner, Detective Kelly Clark, received a radio call about an assault with a deadly weapon[1] in Los Angeles—the Lopez robbery. Because the radio call reported that one of the assailants was a suspected member of the

---

[1] The reported crime was later reclassified as a robbery. J.A. 60, 66.

Drifters gang and had a gang-related tattoo on the top of his head, the officers drove to petitioner's apartment building, a known location for the Drifters. They parked in the alley behind the building, approximately a quarter mile from the robbery site. Officer Cirrito saw a man run across the alley toward the building, and up the exterior back stairs, and then enter a second-floor apartment. J.A. 57-60, 62, 71, 118.

Officer Cirrito soon heard loud male and female voices yelling and screaming from the same second-floor apartment. He and Detective Clark waited for backup officers and then walked up the back staircase with several other officers. Officer Cirrito knocked on the door of the unit from which he had heard the yelling—the same apartment where he had seen the man run inside. J.A. 61-62, 74, 76, 118.

Roxanne Rojas, a woman in her twenties, opened the door, holding an infant. She appeared upset. The bridge of her nose and her forehead were swelling, she was out of breath, and her shirt and hand were smeared with fresh blood. J.A. 62-63, 79, 120.

Officer Cirrito and Detective Corona, one of the backup officers, spoke to Rojas at the doorway of the apartment. Officer Cirrito questioned her about the blood and the yelling and asked whether there was anyone else in the apartment. Rojas told him (falsely) that only she and her children were inside the apartment. J.A. 121.

Officer Cirrito, however, saw petitioner inside. Petitioner was sweaty and appeared "real angry." Petitioner yelled, "Get out. I know my rights. You can't come in." J.A. 63-64. From the loud yelling and screaming and the way Rojas looked, the officer believed that a battery or domestic violence incident between them had just taken place. The officer decided that it was important to separate them. He was also concerned that there might be someone else in the apartment. J.A. 64-65, 122.

In order to investigate the suspected domestic-violence incident, Officer Cirrito asked petitioner to step out of the apartment. Petitioner refused, saying, "I know my constitutional rights. You can't come in." J.A. 76-77. Officer Cirrito and Detective Corona entered the apartment, and took petitioner outside. With the help of another officer, they handcuffed petitioner and escorted him down the back stairwell to keep him apart from Rojas. Meanwhile, other officers conducted a protective sweep of the apartment. J.A. 124-25, 136. From Officer Cirrito's perspective, he was conducting a domestic violence investigation. J.A. 65-66, 77, 122.

But as petitioner walked down the stairs, Officer Cirrito saw a tattoo on the top of petitioner's head. It appeared to match the description of the tattoo of the reported assault/robbery suspect. J.A. 65, 134. After Officer Cirrito confirmed the robbery suspect's description with the officers at the robbery scene, the police transported Lopez to the alley behind the apartment building. They arrived ten to fifteen

minutes later. Lopez identified petitioner as the person who had robbed him. J.A. 65, 78. At that point, the police transported petitioner to the police station. J.A. 6, 66, 78, 80-82, 151.

Approximately an hour after the police had taken petitioner downstairs, Officer Cirrito returned to the apartment. J.A. 66, 81, 137. Rojas told him that she lived in the apartment with petitioner and her children. Detective Clark asked for and received Rojas's oral and written consent to search the apartment. J.A. 66-67, 129. He obtained this consent before interviewing her about the domestic violence incident. Police officers entered and searched the apartment. They recovered clothing, a knife, a sawed-off shotgun, and ammunition. J.A. 68.

In response to Rojas's suppression-hearing defense testimony that she did not want to sign the consent form, and that she had felt that the officers "pretty much" pressured her into consenting, J.A. 94, 100, Officer Cirrito stressed that when Rojas first opened the door he believed he had encountered an ongoing domestic violence incident. His thoughts were swirling "like a hurricane." He saw "a female with an infant" and "blood, swelling, the yelling, the possibility someone's in there. Is she just trying to blow me off, or is there somebody in there? Are there children? Is he holding a child hostage?" When Officer Cirrito saw petitioner approaching from the kitchen area, he became concerned for officer safety because petitioner was visibly angry. J.A. 122-23.

Officer Cirrito explained, further, that only two officers had stepped inside to remove petitioner and that petitioner was never taken down onto the ground, pushed, or dragged down the stairs. J.A. 124-25. In obtaining Rojas's consent, the officers did not threaten her in any way. J.A. 129. Two days later, during an interview with the police, Rojas explained that she did not want to be a "rat," and said that petitioner would be very upset if he knew she was talking to the police. J.A. 7, 131.

2. The trial court denied the suppression motion. It found that the police had acted reasonably in investigating a potential crime—domestic violence—when they knocked on the apartment door after hearing the sound of a serious verbal altercation. Their legitimate suspicions were confirmed when Rojas answered and the officers saw her injuries. When petitioner approached them in a hostile manner, the court observed, the police had further cause to investigate the domestic-violence incident and a legitimate basis to detain petitioner briefly for officer-safety reasons. Therefore, the court ruled, the initial detention and handcuffing of petitioner amounted to a valid investigatory stop pursuant to *Terry* v. *Ohio*, 392 U.S. 1 (1968). At that point, held the court, the officers properly and reasonably conducted a protective sweep for the purpose of officer safety—to determine whether any other dangerous person was in the apartment.

The court further ruled that, upon Officer Cirrito's observation that petitioner had a tattoo like

the one worn by the Lopez robbery suspect, there arose cause to detain petitioner further to conduct the field show-up. When Lopez identified petitioner as his assailant, it gave the officers probable cause to arrest him. J.A. 150-52.

As to the apartment search, the trial court found that Rojas had given the officers her valid, voluntary consent. Based on the court's observation of her demeanor and on her repeated statements that she had thought about consenting before she decided to sign the form, the court found that, despite feeling some pressure, Rojas had not been coerced. J.A. 152.

3. After the trial court denied the suppression motion, petitioner pleaded no contest to three counts of firearm and ammunition possession. Following a trial on the remaining two counts, the jury found petitioner guilty of inflicting corporal injury on Rojas and of the second-degree robbery of Lopez. The jury also returned two sentence-enhancing findings—that petitioner had used a knife in committing the robbery and that he had committed it for the benefit of a criminal street gang. The trial court sentenced petitioner to prison for a term of fourteen years. J.A. 3.

4. On appeal, petitioner contended, in part, that the search of his apartment in which the weapons were discovered had been unreasonable under *Georgia* v. *Randolph*, 547 U.S. 103 (2006), because, despite Rojas's consent, he had refused consent at the apartment. J.A. 16-17. The California Court of Appeal rejected the contention, holding that Rojas's consent

to search the apartment she shared with petitioner was valid and justified the officers' actions. As the court explained, petitioner's "absence from the home when Rojas consented to a search of the apartment is, we believe, determinative. *Randolph* did not overturn prior cases holding that a co-inhabitant may give effective consent to search a shared residence; to the contrary, the *Randolph* court explicitly affirmed the vitality of those cases." J.A. 31. Moreover, the appellate court reasoned that "requiring officers who have already secured the consent of a defendant's cotenant to also secure the consent of an absent defendant would similarly and needlessly limit the capacity of law enforcement to respond to 'ostensibly legitimate opportunities in the field.'" J.A. 32-33 (quoting *Randolph*, at 122).

The state appellate court further explained that its holding was consistent with those of a large majority of federal courts of appeals. And it rejected the holding and rationale of a contrary opinion from the Ninth Circuit Court of Appeals, *United States* v. *Murphy*, 516 F.3d 1117 (9th Cir. 2008). The state court reasoned that *Murphy* would anomalously "permit[ ] 'a one-time objection' by one cotenant to 'permanently disable the other [cotenant] from ever validly consenting to a search of their shared premises,'" and opined that "such a rule 'extends *Randolph* too far.'" J.A. 33 (quoting *United States* v. *Henderson*, 536 F.3d 776, 783 (7th Cir. 2008)).

5. The California Supreme Court denied further direct review. J.A. 51. This Court granted certiorari. 133 S. Ct. 2388 (2013).

SUMMARY OF ARGUMENT

When the police search a home pursuant to the consent of an occupant with authority to grant it, the search is valid under the Fourth Amendment without regard to the prior objection of a co-occupant who is not present at the residence. Under this Court's Fourth Amendment jurisprudence, a defendant's privacy expectations in such an instance are not privileged over those of the co-occupant with whom he shares a dwelling space. Here, Rojas was a cotenant whose authority to admit visitors and consent to searches was equal to petitioner's, and she gave the police voluntary consent to search when petitioner was not present due to his lawful arrest. The police acted reasonably in relying on her consent to search the premises.

a. In seeking to justify a rule that would allow his prior objection to disable Rojas from exercising her right to consent to a search of the shared premises, petitioner overlooks the bedrock Fourth Amendment principle that consent enjoys favored status. Consent is not a narrowly drawn exception to the warrant requirement, but a favored means of satisfying the Fourth Amendment's core mission of protecting the security of citizens' privacy against arbitrary

police intrusions. Consent functions as a constitutional and legitimate aspect of law enforcement that replaces any need for a warrant and probable cause. Consensual searches serve the important societal interests of providing an effective means of obtaining reliable evidence and preventing innocent persons from being charged with criminal offenses—and they do so while preserving Fourth Amendment rights.

The Fourth Amendment does not confer greater rights upon persons, like petitioner, who are subject to criminal investigation, over persons, like Rojas, who have equal privacy interests in their own house. Inherent in shared living arrangements is the mutual understanding that in one's absence the other may admit visitors into shared spaces.

In this case, Rojas had equal authority over the premises she shared with petitioner, and they assumed the reciprocal risk that, in the other's absence, one would admit visitors unwelcome to the other. Petitioner, in failing to consider Rojas's interests, misapplies the Fourth Amendment and this Court's precedent to impose a prospective veto on a cotenant's freedom to consent to entry.

b. *Georgia* v. *Randolph* does not compel invalidation of the search in this case. The Court's opinion in that case was narrowly crafted to preserve the well-settled law of co-occupant consent, including the recognition in *United States* v. *Matlock*, 415 U.S. 164 (1974), that co-occupants assume the risk that a cotenant might permit a search of the shared premises.

Randolph reached a special and admittedly formalistic accommodation in which the normal efficacy of a co-occupant's consent is suspended only when the other tenant is present and objects. When equally situated tenants dispute a police entry, *Randolph* reasoned, neither property law nor widely accepted social expectations provided a final answer to the question of whose interest prevails. In that unique circumstance, the police may not rely on the consent of one occupant to search the shared premises because such an entry would risk escalating the verbal dispute into a violent confrontation and would entail a direct affront to the objector.

However, when the objecting co-occupant is not present—especially when his absence is due to a lawful arrest—the concerns animating *Randolph*'s holding disappear, and the general rule in favor of co-occupant consent comes to the fore. To extend *Randolph*'s formalistic exception to circumstances in which the objector is not even present would set up a broad rule vesting the objector with a continuing absolute veto. That would disregard the unique reason for *Randolph*'s limited formalism and contradict this Court's intention of preserving its holdings in *Matlock* and *Illinois* v. *Rodriguez*, 497 U.S. 177, 183-84 (1990).

c. Neither "social expectations" nor property law considerations support extending *Randolph*'s suspension of cotenant consent beyond the circumstance of present and actively disputing cotenants. Petitioner can point to no widely accepted social

understanding that an absent co-occupant's prior objection prevails against a present co-occupant's consent. Nor do property law considerations support recognition of the power in one tenant to preclude another from inviting the guests of his choice in the other's absence.

Those contrary societal expectations are especially strong where a resident has been subjected to domestic abuse. Allowing an abusive tenant's preemptive objection to limit, if not deprive, an abused cotenant of his or her right to consent to police entry creates intolerable risks. Rojas likely felt unable to request police assistance in petitioner's presence. But, once he had been lawfully removed, she retained her right to disassociate herself from petitioner's gang-related criminality and to seek removal of the illegal firearm and ammunition petitioner had secreted on the premises.

d. Nor may petitioner claim unlawful conduct of the police in removing him. The officers' decision to take petitioner into custody was a lawful and reasonable exercise of law-enforcement prerogatives; a reasonable arrest cannot be an unreasonable seizure under the Fourth Amendment.

Similarly, the potential availability of alternative means for obtaining the right to search, including applying for a search warrant, is irrelevant when the search is consensual. The Fourth Amendment does not mandate that the police may investigate only in

ways that pose the most minimal potential effect on a person's privacy.

A rule confirming the tenant's right to consent in the absence of a cotenant is straightforward and easy to apply. The question of whether a defendant was physically present when consent was sought will be clear.

ARGUMENT

A Tenant's Consent To Search Given When An Objecting Cotenant Is Absent Satisfies The Fourth Amendment

By petitioner's lights, this case presents the specter of the police ignoring his prior objection and insulting his personal autonomy by failing to obtain his consent before searching the apartment. His discussion scants the most crucial element—domestic-violence victim Rojas, a person with equal dignity under the Fourth Amendment and equal control over the premises, voluntarily consented when he was no longer present because he had been lawfully arrested for the Lopez robbery. Not only that but, when petitioner objected to police entry, the officers were legally entitled, if not obligated, to disregard it.

This Court's longstanding precedents consistently favor cotenant consent because it protects privacy and autonomy interests at the core of the Fourth Amendment. This Court's Fourth Amendment jurisprudence, consistent with traditional property law,

recognizes that a tenant such as Rojas has an equal right to admit visitors of her choice, while a cotenant such as petitioner assumes the risk that in his absence she might admit persons he considers unwelcome. Petitioner can point to no widely held "social expectations" that would prevent a visitor from accepting an invitation from an authorized tenant just because an absent cotenant had previously objected.

When Rojas chose to consent in petitioner's absence with knowledge of his prior objection, she exercised her autonomy in the manner favored by this Court: She protected and distanced herself and her children from petitioner's criminal activity, and chose to assist the police in conducting a criminal investigation.

A. This Court's Fourth Amendment jurisprudence favors consent by cotenants because it is consistent with reasonable privacy expectations, protects personal autonomy, and furthers legitimate law enforcement

By beginning his Fourth Amendment analysis *in medias res* with *Randolph*, petitioner fails to place the limited holding of that case within the broader doctrinal context of consensual searches. That context is essential for understanding and applying *Randolph* in the limited way it was intended. By its express rationale and internal logic, *Randolph* was not a repudiation of the Court's fundamental recognition

that consensual searches are wholly consistent with the protection of Fourth Amendment interests. It was, rather, a special accommodation for a unique situation—the presence of cotenants who are actively disputing whether to consent or to insist on a warrant. Petitioner's approach overlooks the longstanding authority favoring consent that *Randolph* was at pains to preserve. He thereby misreads *Randolph* as creating a bright-line rule that would forever bar a cotenant from consenting to the search of shared premises until a previously objecting cotenant deigns to give leave.

1. Consent searches have a favored Fourth Amendment status

Randolph was not created in a vacuum. Rather, it grew out of, and fit within, a traditional analytical framework that favors consensual searches, including those given by "third parties." Such consensual searches are favored because they not only comport with the Fourth Amendment's core value of protecting privacy, but do so in a manner respectful of the proper relationship between citizens and the police under the rule of law.

a. Here, the officers did not search the apartment until they had received the voluntary consent of an authorized tenant. "In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for

consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion." *United States* v. *Drayton*, 536 U.S. 194, 207 (2002).

Consent stands as an alternative means of protecting "one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment [and] is basic to a free society." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 453 (1971) (quoting *Wolf* v. *Colorado*, 338 U.S. 25, 27-28 (1949)); see also *Maryland* v. *King*, 133 S. Ct. 1958, 1969 (2013) ("[T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner."). When a citizen voluntarily authorizes the police to enter and search, there can be no arbitrary invasion of privacy.

"Consent searches are part of the standard investigatory techniques of law enforcement agencies" and are "a constitutionally permissible and wholly legitimate aspect of effective police activity." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 228, 231-32 (1973). "[T]here is nothing constitutionally suspect in a person's voluntarily allowing a search." *Id.* at 242-43. As *Schneckloth* explained, "[A] search authorized by a valid consent may be the only means of obtaining important and reliable evidence." *Id.* at 227. It follows that "to place artificial restrictions upon such searches

would jeopardize their basic validity." *Id.* at 229; see also Lafave, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (2012), Ch. 8.1 ("The practice of making searches by consent is not a disfavored one."). Indeed, consent has a favored status because "the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense." *Schneckloth*, 412 U.S. at 243.

b. Although sometimes referred to as an exception to the Fourth Amendment's warrant requirement, voluntary consent for a search effectively stands as an independent justification that renders a search reasonable and obviates the need for a warrant and probable cause. Once a person consents to a search, he authorizes the police entry for the requested purpose, which "may be precisely the same as if the police had obtained a warrant." *Schneckloth*, 412 U.S. at 243; see *Illinois* v. *Rodriguez*, 497 U.S. 177, 183-84 (1990) (cotenant consent is an element "that can make a search of a person's house 'reasonable.'"). *Randolph* itself also "recognize[d] the validity of searches with the voluntary consent of an individual possessing authority." 547 U.S. at 109; see also *Kentucky* v. *King*, 131 S. Ct. 1849, 1858 (2011).

2. Co-occupant consent is equally favored under the Fourth Amendment

a. For purposes of the Fourth Amendment, the right to consent broadly empowers all co-occupants with equal access to the subject premises. Far from being construed narrowly, consent "extends even to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant." *Randolph*, 547 U.S. at 109 (citing *Illinois* v. *Rodriguez*, 497 U.S. at 186).

The Fourth Amendment's proscription against unreasonable warrantless home entries to search no longer obtains once consent is given by "the individual whose property is searched or from a third party who possesses common authority over the premises." *Rodriguez*, 497 U.S. at 181 (citation omitted).

b. Under the Court's consent doctrine, persons with equal privacy interests in shared premises have equal authority to give consent. That is, as between persons with equal privacy expectations in the searched premises, the co-occupant subject to criminal investigation has no priority in law. As this Court explained in *United States* v. *Matlock*, 415 U.S. 164 (1974), a consenting tenant acts not as the defendant/cotenant's agent, but instead exercises his or her own right to consent or to deny entry to search.

In justifying this "third-party consent" rule—it is really a "primary party consent" rule—*Matlock* drew on the established distinction between consent to

search under the Fourth Amendment and the waiver of constitutional trial rights. The constitutional protection against unreasonable searches, in contrast to trial rights, has no special application to criminal defendants; it applies equally to similarly situated cotenants. "[T]he voluntary consent of any joint occupant of a residence to search the premises jointly occupied is valid against the co-occupant" largely because "a consent search is fundamentally different in nature from the waiver of a trial right." *Matlock*, 415 U.S. at 169-71 (citing *Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969), *Coolidge* v. *New Hampshire*, 403 U.S. at 487, and *Schneckloth*, 412 U.S. at 219). For purposes of consent to search, the prosecution "is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *Id.* at 171 (footnote omitted).

In petitioner's solipsistic analysis, Rojas's rights and interests are irrelevant and displaced by his own. But, as explained above, this Court's consent doctrine is not informed by an agency theory, whereby Rojas would be charged with exercising petitioner's Fourth Amendment rights on his behalf. Instead, the "common authority" that justifies such consent rests "on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the coinhabitants has the right to permit the inspection *in*

his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Matlock*, 415 U.S. at 171-72 n.7 (emphasis added).

In short, the nature of shared authority confers on each co-occupant a personal right to authorize consent, which presupposes a reciprocal assumption of risk. As *Randolph* itself acknowledges, 547 U.S. at 111, that risk reflects a co-occupant's diminished expectation of privacy that is integral to the "widely shared social expectations" that help determine whether a cotenant's consent is consistent with the Fourth Amendment.

3. The search was reasonable because Rojas, an authorized tenant, voluntarily consented to it

The Fourth Amendment predicates for valid cotenant consent were present here. Rojas had apparent and actual authority to admit visitors and consent to a search. She gave Officer Cirrito her name and "stated that she lived there with her boyfriend, [petitioner,] and her children." J.A. 66. "When someone comes to the door of a domestic dwelling with a baby at her hip, . . . she shows that she belongs there, and that fact standing alone is enough to tell a law enforcement officer or any other visitor that if she occupies the place along with others, she probably lives there subject to the assumption tenants usually make about their common authority when they share

quarters." *Randolph*, 547 U.S. at 111. Accordingly, petitioner would understand that she "may admit visitors, with the consequence that a guest obnoxious to [him] may nevertheless be admitted in his absence by [her]." *Id.*

Nor is there any question before this Court of whether Rojas gave her consent voluntarily.[2] By consenting to a search, she was not only able to distance herself from petitioner's criminality, but to protect herself, her infant, and her four-year-old son from the danger inherent in having a sawed-off shotgun and ammunition stored in the family dwelling.[3]

When petitioner and Rojas became joint occupants of the apartment, petitioner had assumed the risk that, when he was absent, she might exercise her authority as a co-occupant and admit visitors of her choice. By failing to consider Rojas's interests, petitioner overlooks the necessary implication of extending *Randolph* in the way he proposes—it would read the Fourth Amendment to impose a prospective veto on a cotenant's freedom to consent to (or refuse) entry.

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[2] In its amicus brief supporting petitioner, the National Association of Criminal Defense Lawyers (NACDL) relies extensively on the suppression motion testimony by Rojas (NACDL Br. 4, 14-15), without acknowledging that Officer Cirrito denied her allegations of improper pressure, and that the trial court found her consent was given voluntarily without police coercion. No dispute about the fact that Rojas voluntarily consented is properly before this Court.

[3] Indeed, the four year old was the person who showed the police where the sawed-off shotgun was located. J.A. 84.

Nothing in this Court's consent jurisprudence would justify such a veto.

B. *Randolph* recognized only a narrow departure from the general validity of cotenant consent in a unique circumstance

Petitioner over-reads *Randolph* as creating a rule whereby a co-occupant's objection to police entry carries prospective force such that his subsequent absence due to lawful arrest precludes a cotenant from consenting to a search of their shared living space. That is, even after his removal and arrest, his objection would continue to bar a search with a tenant's consent until he also personally chooses to consent. His argument misreads *Randolph* in a fundamental way. *Randolph*'s lead opinion, reinforced by the rationale of Justice Breyer's concurrence, crafts only a narrow exception to the Court's prior holdings that the police may rely on consent by a cotenant having apparent authority to authorize entry into shared premises. That formalistic exception applies when consent to search is actively disputed by cotenants with equal apparent authority who are both present at the time consent is sought.

There is an obvious reason why resort to that narrow exception might be needed in that unique circumstance. Entry during an active dispute between co-occupants who are present at the doorstep would not only cause a direct affront to the objector but would risk escalating a verbal disagreement into

physical violence. In contrast, when the objecting tenant is no longer present, the prospect of violence disappears and the affront is attenuated. There vanishes any compelling need for a *Randolph*-type "formalism" circumscribing the present cotenant's fundamental rights to admit visitors and to distance himself or herself from the objector's criminality.

a. The narrowness of the Court's holding in *Randolph* was both explicit and inherent in the logic of the lead opinion. That opinion made it clear that the issue it was deciding was "the reasonableness of police entry in reliance on consent by one occupant subject to *immediate* challenge by another." *Randolph*, 547 U.S. at 113 (emphasis added). The existence of a contemporaneous dispute and the objector's physical presence were integral to *Randolph*'s holding that "a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant." *Id.* at 122-23.

This Court, moreover, was careful in *Randolph* to preserve the continued viability of the bedrock consent jurisprudence informing *Matlock*'s holding that, in co-occupancies, "'the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.'" *Randolph*, 547 U.S. at 110 (quoting *Matlock*, 415 U.S. at 170). *Randolph* specifically endorsed *Matlock*'s understanding that shared tenancy is commonly recognized as including an "'assumption of risk'" as to the efficacy of cotenant

consent "on which police officers are entitled to rely. . . ." *Id.* at 111.

b. *Randolph* also emphasized that the physical presence of disputing cotenants was the critical difference between *Matlock* and *Rodriguez* on the one hand and *Randolph* on the other. The latter case presented an active dispute by parties at the scene possessing equal authority over the shared premises, but with no clear external means of peaceful resolution. When two cotenants with equal authority disagree at the doorstep as to whether to admit visitors, property rights did not clearly and finally give one a privilege over the other so as to allow police entry under the Fourth Amendment.

Nor was there an accepted social understanding for preferring one occupant's claims over the other's. In that unique context, the Court explained that a "caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out'"—at least if there were no strong countervailing reasons, such as "[f]ear for the safety of the occupant issuing the invitation, or of someone else inside." *Randolph*, 547 U.S. at 113; see pages 26-28, *post*.

The lead opinion in *Randolph*, while preserving the *Matlock* and *Rodriguez* holdings, identified the objector's presence as the pivotal factor that suspended cotenant consent: "[I]f a potential defendant with self-interest in objecting *is in fact at the door and*

objects, the cotenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out." *Randolph*, 547 U.S. at 121 (emphasis added). Resolution of this unique dilemma required the "drawing of a fine line" in an admitted recourse to "formalism." *Id.*

c. Perhaps it made sense to resort to a limited "formalism," departing from the general rule in favor of cotenant consent, when the police are confronted with an active dispute. But it would be another thing entirely to vest "the objector with an absolute veto" by "creating a rule of continuing objection." *United States* v. *Henderson*, 536 F.3d 776, 784 (7th Cir. 2008). If *Randolph* is read as creating a new bright-line rule to privilege an objecting tenant so that his wishes control, however, the formalism would take on a life of its own in needlessly denigrating cotenant rights.

In light of *Randolph*'s internal, limiting logic, there is no compelling reason to adopt the expansive reading petitioner advocates. The great majority of courts to interpret *Randolph* on this point agree. See, *e.g.*, *United States* v. *Shrader*, 675 F.3d 300, 307-08 (4th Cir. 2012); *United States* v. *Cooke*, 674 F.3d 491, 499 (5th Cir. 2012); *Henderson*, 536 F.3d at 783-84; *United States* v. *Hudspeth*, 518 F.3d 954, 960 (8th Cir. 2008) (en banc); *People* v. *Strimple*, 267 P.3d 1219, 1221 (Colo. 2012); *State* v. *St. Martin*, 800 N.W.2d 858, 859 (Wis. 2011); *People* v. *Olmo*, 846 N.Y.S.2d 568, 570 (N.Y. Sup. Ct. 2007). The California Court of Appeal agreed with this mainstream view. J.A. 33.

d. When the objecting tenant is no longer present, the risk of violence disappears. And any perceived unseemliness in a guest's embroiling oneself in an active dispute dissipates too. At that point, the cotenant's "legitimate self-interest in siding with the police to deflect suspicion raised by sharing quarters with a criminal," *Randolph*, 547 U.S. at 116; *Schneckloth*, 412 U.S. at 243, as well as his right to aid the police in apprehending criminals, *Coolidge*, 403 U.S. at 488, become paramount. This is especially so in light of the cotenant's fundamental property and associational rights to admit visitors of choice. See section C, *post*.

Contrary to petitioner's repeated insistence, Pet. Br., 8, 14, *Randolph* did not imply, much less hold, that, if one co-occupant has objected to entry, no subsequent consensual search is permissible until the disputing cotenants reach an agreement. The Court's reference to such mutual agreement was made in the context of an entry during an ongoing dispute as to consent between tenants present at the house with equal authority to admit visitors: "The visitor's reticence [to enter] without some such good reason would show not timidity but a realization that when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority." *Randolph*, 547 U.S. at 113-14.

Justice Breyer's concurring opinion in *Randolph* recognized and was conditioned on the understanding that the holding applied only to the specific facts of

the case: "I stress the totality of the circumstances, however, because, were the circumstances to change significantly, so should the result. That is, the Court's opinion does not apply where the objector is not present 'and object[ing].'" *Randolph*, 547 U.S. 126 (Breyer, J., concurring).

C. Neither "social expectations" nor property law considerations support extending *Randolph*'s suspension of cotenant consent beyond the circumstance of presently disputing cotenants

a. As noted above, *Randolph* relied on the social expectation that a visitor would be reluctant to accept a resident's invitation when it would require the face-to-face defiance of another resident's directive to stay out. But petitioner cannot show there is a common understanding that such a directive would maintain its proscriptive force even after its issuer leaves the scene. There simply is no such expectation.

It is hardly uncommon for a friend or relative of one spouse (say, the wife) to have a disagreement with the other spouse. It is reasonable to assume that the friend or relative would not hesitate to accept the wife's invitation into the premises, despite having been barred by the husband previously. Similarly, if visitors with differing political or religious views had clashed with one cotenant, they would not, after the cotenant has departed, consider themselves barred from entering to discuss those views with the

other tenant despite a prior order to stay out. Social expectations inevitably reflect such mundane decisionmaking.

Indeed, *Randolph* acknowledged the basic "assumption tenants usually make about their common authority when they share quarters"—that "any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another." *Randolph*, 547 U.S. at 111. It would be impossible to deny that visitors often *do* accept invitations when a previously objecting cotenant is absent without the sense that they are transgressing social norms. If there is any common understanding on that score, it would be that the same reticence to push past an objecting tenant would tend to counsel patient waiting until the objecting tenant has left the premises.

As the Seventh Circuit has pointed out, there is no accepted sense in which such forbearance would be understood as "breaking any unwritten social rules." *Henderson*, 536 F.3d at 784. To contend otherwise would run counter to *Randolph*'s own social-expectations rationale by imposing a code of conduct based solely on subjective notions of etiquette. Common sense and experience tell us that "[a] prior objection by an occupant who is no longer present would *not* be enough to deter a sensible third party from accepting an invitation to enter by a co-occupant who is present with authority to extend the invitation." *Id.* (emphasis added).

Petitioner thus fails to satisfy *Randolph*'s "common authority" inquiry, which focused on the expectations of a typical caller confronted with a dispute between cotenants as to his welcome, in yet another way. He adds the consideration of what would happen if the "caller himself created the objector's absence" before seeking consent from the remaining tenant. Pet. Br. 17; see *Randolph*, 547 U.S. at 114-16. Of course, it would not be the typical but the extraordinary visitor who would "cause" a cotenant's removal —and it would shed no light on how cotenants would respond to the *police's* removal of a tenant by lawful arrest. Petitioner cites no basis for any common acceptance of the notion that an intervening arrest would be widely understood to prevent a cotenant from later giving consent or the caller from accepting it.

b. Nevertheless, the amicus brief supporting petitioner argues that application of "longstanding property law" reflects an ingrained social understanding that one occupant's unequivocal objection to a stranger's entry renders a cotenant's subsequent invitation ineffective because no effective license to enter may be granted in the face of the prior objection. Brief of the Nat'l Assoc. of Crim. Defense Lawyers as Amicus Curiae in Support of Petitioner (NACDL Br.) 17-22. NACDL's conclusion is premised on inapposite authority and fundamentally misconstrues traditional concepts of property law.

NACDL's cited source for that dubious proposition itself presents no reliable authority for the

conclusion that there exists an "implied authority to revoke" a cotenant's grant of entry. 2 TIFFANY REAL PROP. § 457 (2012 ed.). The single case on which that source relies for that proposition, *Tompkins* v. *Superior Court of City & Cnty. of San Francisco*, 378 P.2d 113, 116 (Cal. 1963), is of insignificant relevance.

Tompkins acknowledged—as does the State—that a cotenant's rights to consent are not without limits. However, *Tompkins*'s protection of the objector was expressly limited to a situation where "one joint occupant . . . is away from the premises," "another joint occupant . . . is present," and there is "at least" "no prior warning . . . given, no emergency . . . and the officer fails even to disclose his purpose to the occupant who is present." 378 P.2d at 116; see *People* v. *Haskett*, 640 P.2d 776, 786 (Cal. 1982) (limiting *Tompkins* to these facts).

Contrary to NACDL's assertions, generally accepted principles of property law support Rojas's right to admit visitors of her choice in petitioner's absence; and the common law would preclude an action for trespass against such visitors. The right to admit visitors (no less than the right to exclude them) is a basic incident of ownership. It is a "fundamental maxim of property law that the owner of a property interest may dispose of all or part of that interest as he sees fit." *Phillips* v. *Washington Legal Foundation*, 524 U.S. 156, 167 (1998). *Randolph* itself recognized a "standard formulation of domestic property law, that '[e]ach cotenant . . . has the right to use and enjoy the entire property as if he or she were the sole

owner, limited only by the same right in the other cotenants.'" *Randolph*, 547 U.S. at 114 (quoting 7 R. POWELL, POWELL ON REAL PROPERTY § 50.03[1], p. 50-14 (M. Wolf gen. ed. 2005)). Thus, it is consistently acknowledged that "[e]ach cotenant has a right to enter upon, explore and possess the entire premises, *and to do so without the consent of his cotenants*. . . ." 2 TIFFANY REAL PROP. § 426 (2012 ed.) (emphasis added).

If basic property principles did not provide a clear solution to the *Randolph* dilemma, they certainly do not support the existence of a property-law exception to the general rule recognizing cotenant consent as sufficient for entry. As modern treatments of property law explain:

> [A] tenant in common may properly license a third person to enter on the common property. The licensee, in making an entry in the exercise of his or her license, is not liable in trespass to nonconsenting cotenants, particularly in the absence of excessive or negligent use of the right granted and in the absence of fraud in procuring the license.

86 C.J.S. TENANCY IN COMMON § 144 (1997).

NACDL observes, unremarkably, that a cotenant may not take actions that "prejudice" another cotenant's property in certain ways. But inviting a guest to enter temporarily is a far cry from "prejudice" as understood in the cited sources—binding one's cotenants, or corrupting or destroying shared property. See

NACDL Br. 20-21. Permitting entry is well within the licensor's own authority; corruption and destruction is not.

Thus, for NACDL's licensing limitation to apply, the cotenant must have done more than "prejudice" his cotenant in the sense of doing something the latter dislikes, such as admitting someone of whom the latter disapproves. Rather, the cotenant must do something "to the prejudice of the other, in reference to the property so situated." *Rothwell* v. *Dewees*, 67 U.S. 613, 619 (1863). NACDL's argument disregards this distinction.

There is no reason to derogate from property law's acknowledgment of the general right to invite guests of one's choice merely because the guest knows that his presence is obnoxious to a fellow tenant. Just as the guest avoids involvement in an argument by staying out when the objector is present, he does not allow his own assumptions about an absent co-occupant's current beliefs to override the invitation of a present co-occupant when it is extended.

In sum, property rules give the power to a co-occupant to extend an invitation, and no social expectations override those rules when the objector is absent. *Randolph*'s limited and formalistic accommodation might in some situations be a necessary balance of the autonomy interests of both parties—economic, political, and personal—in circumstances involving actively disputing cotenants at the doorstep. But not in this case. Rather than expect visitors

to investigate the current status of conflicts between co-occupants, social expectations permit them to accept an invitation to enter notwithstanding previous expressions of disapproval by another co-occupant.

c. Those societal expectations are especially strong where a resident has been subjected to domestic abuse. An abused cotenant who desires police intervention will be more likely to authorize entry when the abusive cotenant is no longer present.[4] Empirical studies recognize both the need for intervention to prevent future violence and follow-up visits to prevent repeat incidents of violence.[5] Police departments across the nation employ dedicated domestic-violence investigation units that conduct follow-up visits in order to determine whether the situation has been resolved. Permitting these units to enter with the permission of victims, to interview them and if necessary to carry out a follow-up investigation, is essential to protect the victims of domestic violence.[6]

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[4] Research "suggest[s] that three factors inhibit victims from calling the police on partners and family members (versus strangers): the desire for privacy, the desire to protect the offender, and, for partners, the fear of reprisal." Richard B. Felson, et al., *Reasons for Reporting and not Reporting Domestic Violence to the Police*, 40 CRIMINOLOGY, 617, 640 (2002).

NATIONAL INSTITUTE OF JUSTICE, PRACTICAL IMPLICATIONS OF CURRENT DOMESTIC VIOLENCE RESEARCH: FOR LAW ENFORCEMENT, PROSECUTORS AND JUDGES 7 (2009).

[5] City of Portland, Domestic Violence Reduction Unit (D.V.R.U.), http://www.portlandoregon.gov/police/35679 (last accessed Aug. 14, 2013); Los Angeles Police Department, LAPD Domestic Violence/

(Continued on following page)

As this case shows, allowing an abusive tenant's preemptive objection to limit, if not deprive, an abused cotenant of his or her right to consent to police entry creates intolerable risks. The officers conducted the domestic violence investigation after Rojas had consented to the search. J.A. 128-29. If petitioner's application of *Randolph* were correct, however, the officers would have been required first to seek petitioner's leave before obtaining Rojas's consent. That would demean the domestic-abuse victim's compelling interests in protecting herself and her children. Rojas may well have felt unable to request police assistance in petitioner's presence. But once he had been removed, she had a right to disassociate herself from petitioner's gang-related criminality and to seek removal of the illegal firearm and ammunition petitioner had secreted on the premises.

Because of the apparent domestic abuse, the police were entitled to enter the house to remove him at the very time that petitioner voiced his objection. It would make little sense to invalidate Rojas's consent, made approximately one hour after the spousal battery and while her injuries were still fresh. It

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Major Assault Crimes Detectives, http://www.lapdonline.org/get_informed/content_basic_view/8882 (last accessed Aug. 14, 2013); San Francisco Police Department, S.V.C.D.: Domestic Violence/Elder Abuse Section, http://sf-police.org/index.aspx?page=62 (last accessed Aug. 14, 2013); Seattle Police Department, Domestic Violence Unit, http://www.seattle.gov/police/units/investigations/domestic_violence.htm (last accessed Aug. 14, 2013).

would make even less sense to employ a "formalism" to subordinate her consent to petitioner's objection to police entry—even after petitioner had departed the scene—when that objection itself was legally ineffectual for keeping the police outside in the first place.

D. Lawful and reasonable law enforcement actions cannot provide the predicate for a Fourth Amendment violation

Petitioner contends that his absence from the scene cannot work to validate Rojas's consent in the eyes of the police because it was the police who had removed him from the scene when they detained and then arrested him. In this way, he in effect says that his lawful arrest caused the supposed Fourth Amendment violation. That argument is self-refuting. Compliance with the Fourth Amendment cannot be condemned as violating the Fourth Amendment.

1. A lawful arrest cannot give rise to a Fourth Amendment violation

a. *Randolph* implicitly recognized that an objecting co-occupant's absence due to lawful arrest does not vitiate the reasonableness of relying on consent to search given by a present cotenant. To the contrary, *Randolph* identified only one situation in which police conduct might affect the analysis: The co-occupant's permission to search is valid "when there is no fellow occupant on hand"—"[s]o long as there is no evidence that the police have removed the

potentially objecting tenant from the entrance for the sake of avoiding a possible objection." *Randolph*, 547 U.S. at 121. Even if a contrived removal of one tenant could be the basis for invalidating a cotenant's consent, *Randolph* does not imply that removal pursuant to a lawful arrest with probable cause would do so.

Here, petitioner was lawfully removed from the premises, detained, and then arrested. Petitioner does not contend otherwise. Nor does petitioner argue that the officers' subjective motivations—and they were honest here—should matter. He recognizes that the Court has repeatedly rejected Fourth Amendment inquiries into the officer's subjective motivations where probable cause supports an arrest. *E.g.*, *Florida* v. *Jardines*, 133 S. Ct. 1409, 1416 (2013); *Brigham City, Utah* v. *Stuart*, 547 U.S. 398, 404 (2006) ("The officer's subjective motivation is irrelevant.") (citation omitted).

Petitioner nevertheless reasons that his removal pursuant to a lawful arrest rendered the search illegal under *Randolph* because it deprived him of the opportunity to object (or consent) when the officers returned to conduct an evidentiary search. Pet. Br. 19-20, 24-26. That approach is untenable in light of the Court's insistence that a Fourth Amendment violation occurs only when the police action is objectively unreasonable. A lawful arrest upon probable cause comports with the Fourth Amendment. It cannot be said to violate it.

Upon petitioner's lawful arrest, he had no right to remain on the premises. The point is not that petitioner forfeited upon arrest his privacy expectations in the premises he shared with Rojas and her children. It is that, upon his arrest, he had no constitutional grounds for insisting that he remain at home to reach a voluntary accommodation with Rojas on whether the police have consent to search or for any other reason.

b. Petitioner retorts that approving such an arrest could provide an incentive for gamesmanship. That is, he seeks a prophylactic rule to prevent law enforcement encroachment on an arrestee's supposed *Randolph*-given right to prevent a cotenant from authorizing a search against his previously stated objection. But it makes little pragmatic or doctrinal sense to impose formalism on top of formalism, requiring the police to credit a refusal of entry with indefinite prospective force after the objector's departure from the scene. Detaining and separating petitioner from Rojas was part of the domestic violence protocol. J.A. 125. Indeed, under California law, officers are presumptively required to take into custody persons arrested for domestic violence. Cal. Penal Code §§ 853.6(a)(2), 13700, 13701. Petitioner's artful attempt to condemn the valid arrest because it "created" his absence from the residence, Pet. Br. 17, 19, should not obscure the fact that by any objective measure the police acted reasonably.

Certainly, from Rojas's perspective, there was nothing improper in the officers' returning to the

apartment to seek her consent. And the officers had good reason to believe there was evidence in the apartment. See *Brigham City, Utah* v. *Stuart*, 547 U.S. at 404; see also *Kentucky* v. *King*, 131 S. Ct. at 1858 ("If consent is freely given, it makes no difference that an officer may have approached the person with the hope or expectation of obtaining consent.").

c. In order to portray the police's reliance on Rojas's consent as a violation of his own rights, however, petitioner analogizes his "invocation" of the Fourth Amendment to invocations of the right against self-incrimination under the Fifth Amendment or to counsel under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). As explained above, however, petitioner had no Fourth Amendment right to keep the police out of the house at that time, for they properly entered to remove him in furtherance of defusing the apparent domestic violence incident. In any event, the analogy is foreclosed by *Matlock*. There, this Court recognized that "a consent search is fundamentally different in nature from the waiver of a trial right." *Matlock*, 415 U.S. at 171 (citing *Frazier*, 394 U.S. at 740, *Coolidge*, 403 U.S. at 487, and *Schneckloth*, 412 U.S. at 219). As petitioner's own cited authorities demonstrate, the privilege against self-incrimination and *Miranda*'s protections are quintessential trial rights.[7] Stated

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[7] Pet. Br. 18 (citing *Salinas* v. *Texas*, 133 S. Ct. 2174, 2179 (2013) (discussing the trial-centered rationale for the express invocation requirement as to self-incrimination privilege), and *Edwards* v. *Arizona*, 451 U.S. 477, 484-85 (1981) ("an accused

(Continued on following page)

another way, *Randolph* did not silently create a Fourth Amendment analogue to *Miranda*.

Indeed, as *Schneckloth* pointed out when explaining why voluntary consent to search under the Fourth Amendment did not require advising a third party of his right to refuse, *Miranda* itself acknowledged that the police interest in fact-finding is fundamentally different in the contexts of crime-scene investigation and custodial interrogation. *Schneckloth*, 412 U.S. at 231-32. *Miranda* was "'not intended to hamper the traditional function of police officers in investigating crime,'" and it recognized that "'[w]hen an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint.'" *Id.* at 232 (quoting *Miranda*, 384 U.S. at 477-78).

2. Artificially restricting one cotenant's right to consent in the other's absence would impose unjustified restrictions on crime prevention

Further, as the California Court of Appeal recognized, petitioner's argument for restricting the right of a sole tenant at a residence to consent to a search "would needlessly limit the capacity of the police to

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having expressed his desire to deal with the police only through counsel, is not subject to further interrogation . . . unless the accused himself initiates further communication'")).

respond to ostensibly legitimate opportunities in the field." J.A. 32-33 (citing *Randolph*, 547 U.S. at 122.) Such "needless[ ] limit[s]" inferably would include "requir[ing] the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received." *Id.* Thus, here, once the officers obtained Rojas's voluntary consent, a further requirement that they delay transporting petitioner to determine whether he objected to a search would impose an unjustified restriction on legitimate law enforcement prerogatives.

a. Petitioner misses the point when he argues that the police sometimes might obtain evidence by means other than a consensual search. Pet. Br. 22-23, 31. It is true that the exigent circumstances doctrine provides the police with some means of protecting citizens from imminent harm, and facts giving the officer probable cause to arrest will provide the basis for obtaining a search warrant. But it will often be the case, as explained above, see page 15, *ante*, that "a search authorized by a valid consent may be the only means of obtaining important and reliable evidence." *Schneckloth*, 412 U.S. at 227. And the police might have a variety of legitimate reasons to seek consent to search, rather than a warrant. *Kentucky* v. *King*, 131 S. Ct. at 1860-61.

Moreover, the Fourth Amendment does not mandate that the police may investigate only in ways that pose the most minimal potential effect on a person's privacy. Cf. *Colorado* v. *Bertine*, 479 U.S. 367, 373-74 (1987) (officers need not select only the least

intrusive way of fulfilling community caretaking responsibilities). Instead, the hallmark of Fourth Amendment compliance is simple reasonableness. And searching pursuant to valid consent by a tenant is reasonable. For example, the Court rejected any "police-created exigency doctrine" that would prohibit officers from "knock[ing] on the door and seek[ing] either to speak with an occupant or to obtain consent to search" if the officers had already "acquir[ed] evidence that is sufficient to establish probable cause to search particular premises." *Kentucky* v. *King*, 131 S. Ct. at 1860. "Faulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution." *Id.* at 1861.

Similarly, the reasons set out in *Kentucky* v. *King* for proceeding without a warrant are at least as strong as in the consent context. Among the five legitimate reasons described in that case are two that fully apply here: "First, the police may wish to speak with the occupants of a dwelling before deciding whether it is worthwhile to seek authorization for a search. They may think that a short and simple conversation may obviate the need to apply for and execute a warrant. Second, the police may want to ask an occupant of the premises for consent to search because doing so is simpler, faster, and less burdensome than applying for a warrant. A consensual search also 'may result in considerably less inconvenience' and embarrassment to the occupants than a

search conducted pursuant to a warrant."[8] *King*, 131 S. Ct. at 1860 (citations omitted).

b. Moreover, the Court has never held that technological innovations that might increase speed and the availability of obtaining search warrants somehow must exert an inverse-proportion restriction on the viability of seeking consent as an alternative. In any event, such developments are no panacea even when the concern is timeliness. "Telephonic and electronic warrants may still require officers to follow time-consuming formalities designed to create an adequate record, such as preparing a duplicate warrant before calling the magistrate judge. And improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest." *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1562 (2013) (citation omitted).

3. The rule advocated by the State is straightforw and easy to apply

Contrary to petitioner's argument, interpreting *Randolph* as "dispositive" against a disputing fellow

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[8] See *United States* v. *Hudspeth*, 518 F.3d 954, 961 (8th Cir. 2008) (en banc) ("Mrs. Hudspeth, in the self-interest of herself and her children, consented to the seizure of the home computer to prevent the placement of an armed, uniformed law enforcement officer in her home to guard the evidence while a search warrant was obtained.").

occupant when both are present provides a straightforward rule that can be applied to a recurring factual situation in a manner that informs citizens of the scope of their constitutional protection and the police of the scope of their authority. Cf. *New York* v. *Belton*, 453 U.S. 454, 459-60 (1981) (emphasizing the importance of readily applicable Fourth Amendment standards). Notwithstanding petitioner's assertion, Pet. Br. 28, determining "presence" under various circumstances hardly would involve impracticable "ad hoc determinations" or "subtle nuances and hairline distinctions."

As the facts of this case and *Randolph* indicate, the question whether a defendant is present when consent is sought will typically be easy to resolve. If an objecting tenant excuses himself to use the restroom or answer a telephone call, or steps outside to talk to one officer while his cotenant talks to another in the doorway, the trial court would have to resolve the far-from-intractable question whether the officers could reasonably believe the tenant's post-objection conduct indicated an assumption of the risk that the cotenant would consent to the search. A guiding inquiry well might be whether the prospect of a physical altercation remains imminent.

In addition, while one tenant is actively attempting to authorize police entry, a tenant insisting on a warrant would have no reason to leave. In contrast, a decision to leave for a trip to the liquor store while the other cotenant was insisting on consent might well be construed as indifference.

In contrast, a rule giving continuing effect to a prior objection by an absent tenant would create unavoidable questions with no objective, much less doctrinal, basis for resolution.

How long does an objection last? It would be arbitrary to treat it as having no stopping point, for circumstances and minds naturally change over time.

Also, does the objection apply to officers who are unaware of the prior objection? Especially in the domestic violence context, there is the real possibility that different officers will be called to a particular location on repeated occasions.

And, when asking for consent to search apparently shared residences, must officers inquire whether a non-present co-occupant had previously objected? Narcotics investigations, for example, present the real possibility that multiple law enforcement agencies will be involved.

Anyway, given petitioner's concession that officers may rely on a cotenant's representation that the objecting tenant has changed his mind, the central concern driving petitioner's argument—respect for a defendant's personhood—becomes no more than a fig leaf. Whatever formalism was necessary in *Randolph*, it was not intended to extend that far.

* * *

Vesting an objecting tenant with prospective veto power over his cotenant's right to consent would undermine the Court's longstanding recognition that "[c]onsent searches are part of the standard investigatory techniques of law enforcement agencies," and are "a constitutionally permissible and wholly legitimate aspect of effective police activity." *Schneckloth*, 412 U.S. at 228-29, 231-32. Given the lack of any basis in property law or in social expectations for recognizing one tenant's right to exercise such veto power, petitioner's preemptive "invocation" does not trump Rojas's weighty interests in authorizing consent so as to distance and protect herself from petitioner and his instruments of criminality. The better, simpler rule is the one that recognizes the efficacy of cotenant consent flowing directly from *Schneckloth*, *Matlock* and *Rodriguez*.

CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

Dated: September 25, 2013

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REPLY BRIEF

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Supreme Court of the United States

WALTER FERNANDEZ,

Petitioner,

v.

CALIFORNIA,

Respondent.

On Writ of Certiorari
to the California Court of Appeal,
Second District

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REPLY BRIEF FOR PETITIONER

As a result of this Court's decision in *Georgia v. Randolph*, 547 U.S. 103 (2006), people now understand that if they wish to deny the police the ability to search their homes without a warrant, they should – indeed, they must – say so expressly. This case concerns what happens *after* someone follows this Court's instruction and expressly invokes his constitutional right to privacy. The State and the Solicitor General claim that all the police need to do to nullify a person's invocation of his Fourth Amendment rights is forcibly remove him some distance from the doorway – or simply wait for him to leave the premises to go to work, attend to a personal matter, or perhaps even go to bed or the bathroom.

This argument is impossible to square with *Randolph*. The core holding of that case is that once a physically present inhabitant expressly puts the police on notice that he does not want them searching his home without a warrant, officers may no longer presume that a co-inhabitant's consent to do so is good against the objector. Physical presence, in other words, is necessary to trigger *Randolph* and to reverse the ordinary presumption that one tenant's consent is good against another. But once an inhabitant at the threshold of his home tells officers that he does not want them searching through his private living quarters without a warrant, any later consent to do so must be the product of a "voluntary accommodation" from the objector, and not the unilateral action of some other person. *Id.* at 114.

This rule gives clear guidance to police officers. It also is reasonable in operation, for limitations

inherent in *Randolph* itself and elsewhere in Fourth Amendment jurisprudence ensure that objections to warrantless search cannot become perpetual vetoes. By contrast, the continuing "presence" requirement that the State and Solicitor General propose would not only flout the theoretical foundation of *Randolph*, but would render third-party consent doctrine administratively rudderless and utterly manipulable.

I. The Issue Here Involves The Fourth Amendment Rules Governing A Police Investigation Of Past Crime, Not Ongoing Domestic Violence Or A Co-Tenant's Future Property Rights.

It is important at the outset to dispel two straw men. First, contrary to the State's suggestion (Resp. Br. 12), this case does not implicate the police's ability to protect a suspected victim of domestic violence from harm. Second, contrary to the State's and the Solicitor General's suggestions, this case does not involve a co-tenant's "independent" property rights over her shared dwelling. U.S. Br. 18; *accord* Resp. Br. 20. Rather, the only issue in this case is whether the Fourth Amendment allows the police to rely on a tenant's consent to search a home for evidence of past criminal activity by another tenant, when the other tenant has expressly told the police that he does not want them do so without a warrant.

1. The State opens its argument by asserting that "the most crucial element" of this case is that when the police first arrived on the premises, they suspected that Rojas had just been the victim of domestic violence. Resp. Br. 12, 32-34. In reality, this fact has little to do with the question before this Court. Petitioner does not dispute that when the

police first arrived, their suspicions gave them the authority, under the exigent circumstances doctrine, to enter petitioner's home without a warrant to remove him – as well as to ensure that the home was safe and secure for Rojas and her children. *See* Petr. Br. 15; J.A. 125. That warrantless seizure and protective sweep enabled the police to quell whatever ongoing threat existed and to take petitioner into custody for purposes of commencing a prosecution against him.

This case involves police action on a separate occasion – when the officers returned to petitioner's home approximately one hour later. By that time, petitioner had been formally arrested (and taken to the police station in order to be booked) for armed robbery. Rojas faced no ongoing threat. *Cf. Davis v. Washington*, 547 U.S. 813, 829-30 (2006). The police were interested solely in obtaining "possible evidence" against petitioner for already completed criminal activity (namely, the earlier robbery). J.A. 66. Those being the circumstances, this Court should not be distracted by the State's rhetoric about domestic violence. The Fourth Amendment issue in this case concerns solely a police officer's authority to rely in a nonthreatening environment on a co-tenant's disputed consent in order to investigate suspicions of past criminal activity.

2. Nor does this case involve, any more than *Randolph* itself, some freestanding property or dignity interest on the part of a tenant in "making her own decisions about whom she will admit into her home" or in "deflect[ing] suspicion" raised by sharing quarters with a suspected criminal. U.S. Br. 19 (internal quotation marks and citation omitted).

For one thing, the trial court found that Rojas did *not* want the police to search the home, but relented only after the police "pressured" her into consenting. J.A. 144, 152. More important, this Court's decision in *Randolph* already fully accounts for whatever interests a tenant in a case such as this may have "in [her] own right" in cooperating with the police or "deflect[ing] suspicion" away from herself. 547 U.S. at 116, 120. *Randolph* holds that these non-constitutional interests do not invest a tenant with "authority powerful enough to prevail over [a] co-tenant's objection," if validly made, to a search of his home. *Id.* at 121.

Thus, for all the ink the State and Solicitor General spill discussing *Rojas's* purported interests, the only thing at stake here is *petitioner's* right to enforce his objection to the police searching his home. If, as petitioner contends, the police could not nullify his objection simply by forcibly removing him from the premises, then the search here violated the Fourth Amendment, regardless of any interest Rojas may have had in acceding to the police's request to inspect the dwelling.

II. The Police Cannot Nullify An Inhabitant's Invocation Of His *Randolph* Rights Simply By Forcibly Removing Him From His Home.

The State implicitly acknowledges that when a homeowner is arrested and removed from his home, he retains his full privacy interest in his dwelling. Resp. Br. 36. The State nevertheless contends that as soon as the police removed petitioner from his doorway, the officers stripped him of his right to prevent a co-tenant from allowing the police to search

his home without a warrant. The Solicitor General takes this same basic position. These arguments: (1) ignore the respect the police owe to an invocation of one's constitutional right to privacy; (2) fail to come to grips with the rationale of *Randolph*; and (3) overlook the importance of the default warrant requirement in the context of searches of people's homes.

1. This Court has made clear in multiple settings that when individuals invoke their constitutional rights, law enforcement officers must "scrupulously honor" those invocations. *Arizona v. Roberson*, 486 U.S. 675, 683 (1988) (*Miranda* right to cease police interrogation); *see also, e.g., Salinas v. Texas*, 133 S. Ct. 2174, 2179 (2013) (plurality opinion) (right to remain silent); *Quinn v. United States*, 349 U.S. 155, 164 (1955) (same); *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) (right to counsel). This Court likewise has explained that when the police seek permission to conduct a search, "[i]t reinforces the rule of law for the citizen to advise the police of his or her wishes *and for the police to act in reliance on that understanding.*" *United States v. Drayton*, 536 U.S. 194, 207 (2002) (emphasis added). The State argues, however, that a person's invocation of his *Randolph* rights is different. According to the State, the police may nullify such an invocation simply by removing the objector from his doorway because social convention is that callers sometimes feel free to ignore such objections once the objectors are no longer physically present.

The State's argument asks and answers the wrong question regarding social customs. The relevant social-customs question when third-party

consent is at issue is not merely whether a caller who is invited inside a home might take that as an opportunity to go ahead and enter. Rather, the question is whether the caller would reasonably assume that the third party who invited him inside gave consent not only on his own behalf but also implicitly on behalf of the absent co-tenant at issue. *See Randolph*, 547 U.S. at 121-22.

When a caller has never been forbidden by an absent co-tenant from entering the home, the caller may reasonably assume that a present tenant's permission to enter counts not only for himself but also for the co-tenant. *Id.* at 120-22; *United States v. Matlock*, 415 U.S. 165, 171 (1974). But when the absent co-tenant resident has expressly told the caller that he does not want him inside his home, the presumption is reversed. In this circumstance, the customary social understanding is plainly that the caller "would have no confidence" that a present tenant granting permission to enter was speaking not only for himself but also for the prior objector. *Randolph*, 547 U.S. at 113; *accord id.* at 122. If, under these circumstances, the caller went ahead and entered anyway, it would be because the caller was willing to breach social custom related to the meaning of the absent co-tenant's objection, not because the caller actually believed that the objector no longer cared if the caller entered into his private living quarters.

This is especially so in light of the fact that the issue here involves consent to enter in order to conduct a *search*, not – as in the hypotheticals the State and Solicitor General conjure up (Resp. Br. 26; *accord* U.S. Br. 22) – simply to have a *conversation*.

This Court has noted that even when third parties may have authority powerful enough to allow callers to *enter* a dwelling, that does not necessarily mean that police officers may assume that the parties may grant legitimate consent on behalf of absent co-tenants to *search* the dwelling. *See Stoner v. California*, 376 U.S. 483, 490 (1964); *Chapman v. United States*, 365 U.S. 610, 616 (1961) (same). Indeed, in *Randolph* itself, this Court observed that a police officer might reasonably take a child's consent to "cross[] the threshold" of a house as valid against an absent parent but not as a sufficient justification to "rummage through his parents' bedroom." 547 U.S. at 112 (internal quotation marks and citation omitted); *see also Chimel v. California*, 395 U.S. 752, 753, 763 (1969) (officer's legitimate presence inside home did not confer authority to search it).

Applying the distinction between consent to enter and consent to search to this case yields a clear social truism: Even if a caller might sometimes reasonably take a co-tenant's invitation to enter her house for a mere conversation – notwithstanding a prior objection from an absent tenant – as valid, a caller having received such a prior objection would never assume that a co-tenant's invitation to enter to conduct a "search for evidence," *Randolph*, 547 U.S. at 118, was valid. This is because objections to having conversations in a home are sometimes properly viewed as transient – for example, when they arise from a heated exchange among "friend[s] or relative[s]" over "political or religious views," Resp. Br. 26. Objections to searching for evidence of wrongdoing, by contrast, are typically understood to be permanent and enduring.

At a bare minimum, a reasonable visitor would not take the co-tenant's permission to search through the home as valid if the only reason the other tenant was no longer present in the home to protect the privacy of his belongings was because the visitor had removed him from the premises against his will. Contrary to the State's complaint (*see* Resp. Br. 34-38), it matters not if the visitor here – that is, the police – had the legal authority to remove the objecting tenant from his home. The issue is one of "customary social understanding." *Randolph*, 547 U.S. at 121. And while it is fair to say that a tenant who never speaks up "assumes the risk" that a visitor will reasonably take a co-inhabitant's permission to search his belongings as good against him, *Matlock*, 415 U.S. at 171 n.7, it is simply implausible that a visitor would take such permission as valid when the tenant has just told the visitor the opposite and the visitor has made it impossible for the tenant to continue enforcing his wishes. *See* Petr. Br. 20.

2. The implausibility of the State's and Solicitor General's position is further revealed by their inability to square their continuing presence requirement with the reasoning of *Randolph*. According to the State, continuing presence is essential to enforce one's *Randolph* rights because the purpose of the *Randolph* rule is to avoid "escalating a verbal disagreement into physical violence," and "when the objecting tenant is no longer present, the prospect of violence disappears." Resp. Br. 21-22. The United States advances a different argument. According to the Solicitor General, continuing presence is essential because *Randolph* is designed merely to spare an objector "the indignity" suffered when the police search his home "before [his

own] eyes," and "[t]hat specific dignity interest is not implicated when the search takes place in the defendant's absence." U.S. Br. 18. Neither of these attempts to explain *Randolph* is accurate.

a. The *Randolph* rule is not designed to protect the police from physical violence, but rather to safeguard personal privacy. Few, if any, objectors would physically assault a police officer who legitimately claimed a right to enter a house based on a co-tenant's permission.[1] And even in the freak event that an objector was so bold and reckless, police officers could no doubt deal with the situation – as they sometimes have to do when arresting unruly individuals or dealing with other disturbances.

Perhaps for these reasons, the *Randolph* opinion nowhere mentions a concern regarding physical violence against police officers, much less sets it forth as a guiding principle. Rather, the opinion grounds itself in the "customary social understanding" that, in light of the sanctity of the home, one tenant does not have "authority powerful enough to prevail over [a] co-tenant's objection" to the police searching their shared home without a warrant. *Randolph*, 547 U.S.

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[1] Though the State never says so directly, petitioner assumes that the State is imagining a prospect of physical violence between the objector and the officer seeking entry, for it is at least theoretically conceivable that a homeowner might resort to physical violence to defend the threshold of his home. The possibility that one tenant might physically assault another tenant over whether to allow a caller inside is so fanciful as to require no response. Such a possibility also has nothing to do with the Fourth Amendment, which is concerned with citizen-police relations, not citizen-citizen relations.

at 121. That absence of authority does not dissipate simply because the objector is temporarily absent from the premises, or especially when the police physically remove him from the doorway. Instead, once an objector expressly makes his position known, the objection retains its force unless and until "a resolution [is reached] through voluntary accommodation." *Id.* at 114.

b. The Solicitor General's personal dignity theory is even less consonant with *Randolph*. The dignity interest at stake in *Randolph* relates to the home's "special protection as the center of the private lives of our people." *Id.* at 115 (quoting *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring)). The police violate this personal dignity interest in the sanctity of the home whenever, over a person's objection, they rummage through the person's dwelling without a warrant. It makes no difference whether such a search occurs "before the defendant's eyes," U.S. Br. 18. If anything, the police would impugn personal dignity more severely if they were able to nullify a person's objection to such a search merely because they repositioned the person against his will outside of the home while searching it.

3. The ease of furthering legitimate law enforcement objectives while still respecting invocations of constitutional rights and individual privacy clinches the sensibility of enforcing *Randolph* here. Neither the State nor the Solicitor General dispute that almost every time the police arrest someone for a crime that would prompt them to want to search the arrestee's home for evidence, "the facts giving the officer probable cause to arrest will provide the basis for obtaining a search warrant." Resp. Br.

39; *accord* U.S. Br. 31. Nor does either dispute that the Fourth Amendment gives officers ample tools while procuring a warrant to ensure that no evidence is destroyed (or that, if such a risk exists, officers may dispense with seeking a warrant entirely). *See* Petr. Br. 21-22.

The State and Solicitor General maintain, however, that police officers should be able to ignore a homeowner's objection to a warrantless search as soon as he is no longer "present" because warrantless searches are "simpler, faster, and less burdensome than applying for a warrant." Resp. Br. 40 (internal quotation marks and citation omitted); *accord* U.S. Br. 31. This suggestion ignores "the law's general partiality toward 'police action taken under a warrant [as against] searches and seizures without one.'" *Randolph*, 547 U.S. at 117 (quoting *United States v. Ventresca*, 380 U.S. 102, 107 (1965)). When, as here, a tenant has interposed a valid constitutional objection to a search of his most intimate spaces, this Court has held time and again that "the mere fact that law enforcement may be made more efficient" is insufficient reason to dispense with the constitutionally prescribed course of seeking authorization to do so from a neutral and detached magistrate. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978); *accord Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013); *Chapman*, 365 U.S. at 615; *Johnson v. United States*, 333 U.S. 10, 15 (1948).

Even when there is little doubt that the requisite probable cause exists to secure a warrant to search a home, the procurement of a warrant serves a valuable constitutional function. As this Court repeatedly has explained, the presence of a warrant

"reliably 'assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.'" *United States v. Grubbs*, 547 U.S. 90, 101 (2006) (quoting *Groh v. Ramirez*, 540 U.S. 551, 561 (2004) (quoting in turn *United States v. Chadwick*, 433 U.S. 1, 9 (1977))). Put another way, "possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct." *Illinois v. Gates*, 462 U.S. 213, 236 (1983). Hence, at least when a citizen has expressly objected to the police searching through his dwelling, the respect that the law has for individual dignity and "for the privacy of the home," *Randolph*, 547 U.S. at 115 (internal quotation marks and citation omitted), obliges that the default warrant requirement remain in place.

III. Practical Considerations Necessitate Enforcing *Randolph* Under These Circumstances.

Any remaining doubt regarding the proper outcome here is easily resolved on practical grounds. Neither the State nor the Solicitor General dispels the substantial administrability concerns that a strict "presence" requirement would create, while neither is able to point to any genuine problems with adhering to *Randolph*'s "voluntary accommodation" principle.

1. Neither the State's nor the Solicitor General's proffered rule would admit to predictable application while preventing undue manipulation.

a. Despite petitioner's inquiry, *see* Petr. Br. 28, the State never defines its concept of "presence." Instead, it says merely that under its rule courts would have to resolve disputes over continuing

presence by asking "whether the officers could reasonably believe the tenant's post-objection conduct indicated an assumption of the risk that the co-tenant would consent to the search" – an inquiry that "might" be guided by "whether the prospect of a physical altercation remain[ed] imminent." Resp. Br. 42. How that test would apply to the hypotheticals petitioner has posed concerning an objector who needs to temporarily excuse himself (to use the restroom, take a phone call, run an errand, go to work, etc.) is anyone's guess. (Certainly the State's other references (Resp. Br. 21) in its brief to whether an "active dispute" is occurring – whatever exactly that means – shed no light on the subject.) Nor does the State even attempt to explain how its test would apply to situations where the police reposition an objector outside of his home – say, in a patrol car – as apparently is common practice in California and other states, *see* Resp. Br. 36; J.A. 124-25.

Indeed, it is not even clear why the State believes that its test dictates that it should prevail in this very case. The main component of the State's test (asking whether the objector's post-objection conduct evinced an assumption of risk that his co-tenant would consent to a search) suggests that the search was unconstitutional. Petitioner never voluntarily assumed any such risk at all. Only the secondary part of the State's test (asking whether physical violence was imminent) indicates that the search was constitutional.

Under the State's fuzzy conception of the Fourth Amendment, therefore, there seems to be only one sure way for a citizen who lives with others and has legitimately objected to a warrantless search of his home to enforce that objection: The person

apparently must make camp on his doorstep and stand guard on a twenty-four hour basis, for an indefinite period of time. Short of such conduct (which, of course, is ridiculous to require and impossible in the long run to carry out), a person can have no guarantee that his constitutional right to privacy will be respected. Such uncertainty – not only for citizens but also for police officers, who also need to know the law – cannot be tolerated. *See* Petr. Br. 28 (citing cases).

b. The Solicitor General offers a different verbal formulation for what constitutes "presence," but his formulation is no more useful. The Solicitor General says that the continuing validity of a *Randolph* objection turns on whether the objecting occupant "remains on the premises." U.S. Br. 27. This might be read to suggest that an objector is "present" so long as he has merely "moved to another part of the house" (and perhaps if he is outside in the yard), but not if he is outside some unspecified distance from his property line. U.S. Br. 27. But the Solicitor General also endorses this Court's holdings in *Illinois v. Rodriguez*, 497 U.S. 177 (1990), and *United States v. Matlock*, 415 U.S. 164 (1974), which treated tenants in a bedroom and in a patrol car in front of the house as "absent." *Id.* at 170. And the Solicitor General offers no way of dealing with apartment complexes and other living areas, where spaces outside of dwellings (hallways, common lawns, etc.) are usually open to the nonresidents to some degree. Furthermore, what if an objector living in either a house or apartment excuses himself from his property for five minutes – after reiterating his continuing objection and saying he would be right back? In short, it is impossible to know what police

officers on the beat would make of the Solicitor General's "on the premises" test, or what the Government might say it means, in myriad future cases.

Perhaps even more important, the Solicitor General, like the State, is mum on the critical question how his test would apply when the police reposition objectors in nearby squad cars or elsewhere – or simply invite objectors to talk for a few minutes at a nearby coffee shop or precinct station. *See* Petr. 24-25, 29. Just last Term, citing numerous cases allowing the police to forcibly control and reposition people during searches, the Solicitor General stressed that "the Fourth Amendment does not generally dictate the particulars of police procedure for officers in the field." Br. for United States 37, *Bailey v. United States*, 133 S. Ct. 1031 (2013) (No. 11-770); *see also Illinois v. McArthur*, 531 U.S. 326, 329 (2001) (officers may reposition people outside of their homes in preparation for searches). So how far – petitioner must ask again – need the police relocate an objector from his doorway to render him no longer "on the premises"? If all the police need to do is move an objector beyond the curb outside his dwelling, then the Solicitor General's rule is nothing short of a means for rendering *Randolph* a dead letter. Every time someone objects to a police search, the police could remove him from the doorway and automatically nullify the objection.

2. By contrast, the State's and Solicitor General's practical complaints about petitioner's position ring hollow. Giving effect to a legitimate *Randolph* objection unless and until the police reasonably believe that the objector no longer wishes

to refuse a warrantless search is both intelligible and workable.

The State first asserts that petitioner's rule is "arbitrary" because "circumstances and minds naturally change over time." Resp. Br. 43. But that is exactly petitioner's point. If the police prefer not to seek a warrant, they are always free to inquire whether the objector has changed his mind. And if he has, the police may conduct the warrantless search. *See* Petr. Br. 27.

The State next professes confusion over whether a *Randolph* objection would "apply to officers who are unaware of the prior objection." Resp. Br. 43. There is no cause for uncertainty here. This Court held in *Arizona v. Roberson*, 486 U.S. 675 (1988), that police officers are charged with constructive knowledge of invocations of the right to counsel made to other officers. The State offers no reason why the same general rule would not apply to invocations of the Fourth Amendment – at least with respect to officers working in concert on the same investigation.[2] To the contrary, this Court has already held that one officer's knowledge of facts supporting probable cause to search or arrest a suspect should be imputed to other officers. *See United States v. Hensley*, 469 U.S.

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[2] As this Court has held with respect to invocations of the *Miranda* right to cut off custodial questioning, *see Michigan v. Mosley*, 423 U.S. 96, 105-06 (1975), officers need not be charged with constructive knowledge of prior invocations of *Randolph* rights in separate investigations. Put another way, it may be constitutionally "reasonabl[e]," *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990), for an officer to rely on a tenant's consent to enter his home even if another tenant previously refused a different officer consent to enter for a separate purpose.

221, 231-32 (1985); *Whiteley v. Warden*, 401 U.S. 560, 568 (1971). It naturally follows that one officer should ordinarily be charged with knowledge of the fact that a person has expressly refused to consent to a warrantless search of his home at least when, as here, the two officers are investigating the same incident.[3]

For his part, the Solicitor General asserts that allowing a *Randolph* objection to retain force after the objector is no longer present would raise the problem of whether (or when) the objection ever dissolves. U.S. Br. 25. As petitioner already has explained (and the Solicitor General does not really deny), this question is almost entirely an academic one; police officers who encounter objections from people for whom they have probable cause to arrest can normally obtain warrants within hours or even minutes, thus rendering the long-term viability of an objection to a warrantless search irrelevant. *See* Petr. Br. 20-22, 30.

In any event, there is nothing troublesome about treating a *Randolph* objection as continuing so long as the police have no reason to believe the objector has changed his mind – and so long as the other preconditions for a *Randolph* objection remain in place, including that the objector retains equal "authority over the area" to be searched. *Randolph*,

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[3] Of course, in a case in which one officer relied on the consent of a co-tenant – while reasonably unaware that the defendant earlier had objected to a warrantless search of the home for the same purpose – the prosecution may be able to invoke the "good faith" exception to the exclusionary rule. *See Herring v. United States*, 555 U.S. 135 (2009).

547 U.S. at 106. A person arrested one hour earlier, as in this case, retains such authority, while someone "incarcerated" for "ten years" (U.S. Br. 25) almost certainly does not.

Finally, the Solicitor General asks whether a suspect must "expressly indicate that he has changed his mind" in order to allow a warrantless search, or whether that may be "assessed from the totality of the circumstances." U.S. Br. 25-26. This is not a difficult question either. As petitioner's brief already suggested – and as Fourth Amendment law clearly dictates – a totality of the circumstances test controls. Petr. Br. 27-28. So long as the police reasonably believe, based on the totality of the circumstances, that an objector has changed his mind, they may rely on a co-tenant's permission to search the common dwelling.

Of course, nothing like that occurred here. There could be no plausible claim – and neither the State nor the Solicitor General advance one – that the police officers here believed that petitioner changed his mind and was content to leave it to Rojas to grant permission on his behalf to search his home. Because the police nevertheless conducted such a search without procuring a warrant, the police violated petitioner's Fourth Amendment rights.

CONCLUSION

For the foregoing reasons, the judgment of the California Court of Appeal should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

OCT 2 - 2013

No. 12-7822

In the Supreme Court of the United States

WALTER FERNANDEZ, PETITIONER

v.

STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether an individual's consent to search her residence may be prospectively negated by the earlier objection to search of another resident now physically absent because of a lawful arrest.

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SECOND APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

In *Georgia* v. *Randolph*, 547 U.S. 103 (2006), this Court held that a physically present resident's express refusal to consent to a search of a shared dwelling overrides consent to search given by another resident. This case presents the question whether that rule applies where the nonconsenting resident has been arrested and removed from the scene. Federal law enforcement officers frequently conduct searches of premises based on an occupant's consent. In addition, the federal government prosecutes cases in which evidence has been obtained pursuant to consent searches conducted by state authorities. The United States therefore has a significant interest in the Court's disposition of this case.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

STATEMENT

1. On October 12, 2009, Abel Lopez was approached by a man, whom Lopez later identified as petitioner, after Lopez had cashed a check. J.A. 4. Petitioner told Lopez he was in petitioner's "territory" and demanded Lopez's money. J.A. 4-5. After Lopez hesitated, petitioner pulled a knife and attempted to stab Lopez in the chest, cutting his wrist instead when Lopez raised his arm in defense. J.A. 5. Lopez ran away while calling 911, and a group of men who had appeared after petitioner whistled for them gave chase. *Ibid.* The men caught Lopez, beat him, took his wallet and phone, and then ran away. *Ibid.*

While other Los Angeles police officers responded to the scene of the attack, officers Joseph Cirrito and Kelly Clark drove to a nearby alley. J.A. 5. They went there because members of the Drifters gang, which the police dispatcher said might have been involved in the attack, often gathered in that location. *Ibid.* As the officers stood in the alley, two men walked by. *Ibid.* One of them, who appeared frightened, told the officers, "[t]he guy is in the apartment." J.A. 5-6. After walking away quickly, the man returned and said "[h]e's in there. He's in the apartment." J.A. 6.

Officers Cirrito and Clark then saw a man run across the alley and enter the house identified by the man. The house, which had been divided into apart-

ments, was a known gang location. Shortly thereafter, Officer Cirrito "heard sounds of screaming and fighting from the apartment building into which the suspect had run." J.A. 6.

After additional officers arrived, Cirrito and Clark knocked on the door of the apartment from which the screaming had come. Roxanne Rojas, who was holding a baby, opened the door. She appeared to be crying; her face was red; she had a "big bump" on her nose; and she had blood on her shirt and hand "that appeared to come from a fresh injury." Cirrito asked Rojas to step outside so that he could "conduct a sweep of the apartment." J.A. 6.

At that point, petitioner came to the door. J.A. 6. He was dressed only in boxer shorts, was sweaty, and looked "real angry." J.A. 64. Cirrito asked petitioner to step outside because the police suspected he had battered Rojas and wanted to separate the two. *Ibid.* Petitioner yelled "[y]ou don't have any right to come in here. I know my rights." J.A. 6. The officers then restrained petitioner because of the evidence of domestic violence and escorted him out of the apartment. *Ibid.*; see J.A. 65, 77.

As officers took petitioner down the stairs, Cirrito saw a tattoo on top of petitioner's head that matched the description of a tattoo worn by one of the robbery suspects. J.A. 65. Lopez was brought to the location and identified petitioner as the person who had robbed him. J.A. 78, 81.

After Cirrito returned to the apartment, he told Rojas that petitioner had been identified as a suspect in the robbery and asked for consent to search. J.A.

6-7.[1] Rojas consented both orally and in writing. J.A. 7. Officers then searched the apartment and found Drifters gang paraphernalia, a knife that might have been used in the robbery, and a sawed-off shotgun. J.A. 7, 68.

The officers also asked Rojas about her injuries. She said that when petitioner entered the apartment, she confronted him about his relationship with a woman named Vanessa. Petitioner and Rojas argued, and petitioner hit Rojas in the face. During an interview two days later, Rojas told Cirrito that she did not want to be a "rat" and that if petitioner knew she was talking to the police he would be very upset. At that interview, she denied that petitioner had struck her, and instead insisted that it was Vanessa who had caused her injuries. J.A. 7.

2. Petitioner was charged with robbery (Cal. Penal Code § 211 (West 2008)), infliction of corporal injury on a spouse, cohabitant, or child's parent (*id.* § 273.5(a) (West Supp. 2013)), possession of a firearm by a felon (*id.* § 12021(a)(1) (West 2009)), possession of a short barreled shotgun (*id.* § 12020(a)(1) (West

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[1] At petitioner's suppression hearing, Rojas claimed that before seeking consent, the officers warned her that she might lose custody of her children. J.A. 99-100. Officer Cirrito, however, testified that the conversation about Rojas's children occurred after the consent search. J.A. 129. He testified that he told Rojas he was going to notify protective services because her four-year-old son had had access to petitioner's gun. *Ibid.* The trial court found Rojas's testimony "believable at points and unbelievable at other points." J.A. 152. The court concluded that Rojas "felt as pressured" to sign the consent form "as anyone with a cop standing in [her] kitchen [would] feel" but explained that "pressure does not equal duress or coercion." *Ibid.*

2009)), and felony possession of ammunition (*id.* § 12316(b)(1) (West 2009)). J.A. 3.

Petitioner moved to suppress the evidence seized during the search of his apartment. J.A. 15. The superior court denied the motion, concluding that Rojas had voluntarily consented to the search. J.A. 150-152. Petitioner entered pleas of nolo contendere to the three firearms charges. J.A. 14. He proceeded to trial on the robbery and infliction of corporal injury counts. He was convicted and sentenced to 14 years of imprisonment. J.A. 3.

3. The California Court of Appeal affirmed. J.A. 2-50. As relevant here, the court rejected petitioner's argument that, under *Georgia* v. *Randolph*, 547 U.S. 103 (2006), his initial refusal to allow the officers entry into the apartment prospectively negated Rojas' later consent to search the apartment. J.A. 15-33. The court found *Randolph* inapplicable because petitioner (unlike the defendant in *Randolph*) was absent at the time Rojas consented. J.A. 31. The court noted that "*Randolph* did not overturn prior cases holding that a coinhabitant may give effective consent to search a shared residence." *Ibid.*

The California Supreme Court denied review. J.A. 51.

SUMMARY OF ARGUMENT

An occupant of a residence may validly consent to its search even if a different occupant, now absent because of his arrest, had previously objected.

1. This Court has long recognized that consent searches are an important and valuable tool for law enforcement. It has accordingly avoided imposing "artificial restrictions" on such searches that would discourage their use. *Schneckloth* v. *Bustamonte*,

412 U.S. 218, 229 (1973). Of particular relevance here, the Court has held that anyone jointly occupying a premises may validly consent to its search. *E.g.*, *United States* v. *Matlock*, 415 U.S. 164, 171 (1974).

2. In *Georgia* v. *Randolph*, 547 U.S. 103 (2006), the Court established a narrow exception to that general rule, holding that such consent is invalid when a physically present co-occupant contemporaneously objects. Both the Court's description of that exception and the logic underlying it rested on the physical presence of the objector. If the objecting co-occupant is absent, the general rule, rather than its *Randolph* exception, applies, and the consent of any co-occupant is valid. To hold that the absent co-occupant's objection can prospectively veto any subsequent consent by another resident would unreasonably impinge on the authority of the consenting co-occupant to make her own decisions about whom she will admit into her own home.

Randolph's physical presence requirement is consistent with the "widely shared social expectations" that informed that decision's analysis. 547 U.S. at 111. The Court in *Randolph* stated that one visiting an acquaintance would generally not feel free to enter her residence over the objection of a co-occupant standing in the doorway, and it adopted a mirroring rule of Fourth Amendment consent. *Id.* at 113. The social calculus, however, is different when the objecting co-occupant is absent. Under those circumstances, most would feel free to enter a residence at the invitation of the individual actually present, and the Fourth Amendment should reflect the same understanding.

3. To adopt petitioner's rule permitting a co-occupant's objection to trump later consent by another resident would create serious problems of administra-

bility. Unless a prior objection were *permanently* controlling, such that it could defeat consent from another resident given years later, courts would have to decide on an expiration date for the objection. But any particular cut-off date would be arbitrary and unrelated to any Fourth Amendment value.

4. Petitioner's alternative argument that the objection of an absent co-occupant should control when his absence is caused by an arrest fares no better than his principal submission. So long as the police have an objective basis for removing a defendant, *e.g.*, probable cause that he has committed a crime such as a domestic battery, their subjective motivation for doing so should not be relevant. And if a defendant's arrest is legally justified, then the resulting absence should have the same effect as any other absence: it leaves the decision whether to consent to a search in the hands of the remaining co-occupant.

5. Finally, petitioner's contention that police can settle for alternative means of securing evidence if an absent co-occupant's objection is given ongoing effect provides no reason for adopting that rule. Such alternative means will not always be available, and, in any event, this Court has clearly and repeatedly held that consent searches are a valid tool for law enforcement. A consent search is not invalid just because police might have been able to obtain evidence in some other way.

ARGUMENT

OFFICERS MAY SEARCH A RESIDENCE BASED ON THE CONSENT OF ONE OCCUPANT FOLLOWING THE LAWFUL ARREST OF ANOTHER OCCUPANT WHO OBJECTED TO THE SEARCH

The Fourth Amendment of the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Although the "Fourth Amendment generally prohibits the warrantless entry of a person's home," the "prohibition does not apply * * * to situations in which voluntary consent has been obtained." *Illinois* v. *Rodriguez*, 497 U.S. 177, 181 (1990). A search based on voluntary consent, or the reasonable belief that a person with apparent authority has consented, is constitutionally "reasonable." *Id.* at 183-184.

When, as here, two persons possess joint authority over the premises, either may give effective consent for a search. *United States* v. *Matlock*, 415 U.S. 164, 169-172 (1974). In *Georgia* v. *Randolph*, 547 U.S. 103 (2006), the Court established a narrow exception to that general rule, holding that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a *physically present* resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." *Id.* at 120 (emphasis added). The physical presence of the objecting co-occupant was the critical fact for the Court in *Randolph*, and the logic of that decision does not extend to situations, like that here, where the objecting resident has been lawfully arrested and removed from the premises.

A. An Occupant Of Premises Shared With Another May Validly Consent To A Search

As this Court has long recognized, "[c]onsent searches are part of the standard investigatory techniques of law enforcement agencies" and are "a constitutionally permissible and wholly legitimate aspect of effective police activity." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 228, 231-232 (1973). In some situations, "a search authorized by a valid consent may be the only means of obtaining important and reliable evidence." *Id.* at 227. And "the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense." *Id.* at 243.

The Court has thus sought to avoid "artificial restrictions" on consent searches that "would jeopardize their basic validity." *Schneckloth*, 412 U.S. at 229. For example, the Court has said that, unlike in the case of "those constitutional guarantees that protect a defendant at trial," it would be improper to require that "every reasonable presumption * * * be indulged" against a finding of consent to search. *Id.* at 243. The Court has similarly declined to require the government to prove that a consenting individual was aware of his Fourth Amendment rights and voluntarily waived them. *Id.* at 227-248 (distinguishing *Johnson* v. *Zerbst*, 304 U.S. 458 (1938)). Instead, the Court requires only that consent to search be "voluntary," as determined by examination of "the totality of all the circumstances." *Id.* at 227.

1. Consistent with its rejection of artificial rules that would inhibit consent searches, this Court has

long held that anyone who jointly possesses premises or effects may validly consent to their search and, correspondingly, that the consent of absent possessors is not required. For example, in *Frazier* v. *Cupp*, 394 U.S. 731 (1969), the Court upheld a search of the defendant's duffel bag because his cousin, who "was a joint user of the bag" and thus "clearly had authority to consent to its search," had agreed to the search. *Id.* at 740. The defendant had insisted that the cousin "only had actual permission to use one compartment of the bag and that he had no authority to consent to a search of the other compartments." *Ibid.* The Court declined to "engage in such metaphysical subtleties in judging the efficacy of [the cousin's] consent." *Ibid.* Instead, the Court rested on the proposition that, "in allowing [his cousin] to use the bag and leaving it in his house," the defendant "must be taken to have assumed the risk that [his cousin] would allow someone else to look inside." *Ibid.*

In *United States* v. *Matlock*, 415 U.S. 164 (1974), the Court followed the same approach when considering a consent search of a house. In that case, the defendant was arrested in his front yard and restrained in a squad car a short distance from his house. *Id.* at 166; see *id.* at 179 (Douglas, J., dissenting). "Although the officers were aware at the time of the arrest that [the defendant] lived in the house," they did not ask him for consent to search. *Id.* at 166. Instead, they sought and received consent from his girlfriend, who also lived there. *Ibid.* The Court held that the girlfriend's consent was sufficient to authorize the search. The Court explained that "when the prosecution seeks to justify a warrantless search by proof of voluntary consent," it need not

show that "consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority or other sufficient relationship to the premises." *Id.* at 171.

The Court in *Matlock* explained that the common "authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements." 415 U.S. at 171 n.7. The authority "rests rather on mutual use of the property by persons generally having joint access or control for most purposes." *Ibid.* In such circumstances, "it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Ibid.*

In *Rodriguez*, the Court addressed a search based on consent by the defendant's girlfriend. 497 U.S. at 179. The defendant was sleeping in the apartment at the time the police entered, but the Court did not hold that officers should have roused him to seek his consent. *Id.* at 180. Nor was the girlfriend's consent vitiated because she did not actually have authority over the premises. The Court instead held that warrantless entry is "valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not do so." *Id.* at 179; see *id.* at 183-189.

2. In *Randolph*, the Court addressed the question whether one occupant can give valid consent to a search of shared premises when a physically present co-occupant contemporaneously refuses consent. 547

U.S. at 106. There, police officers went to the Randolphs' home in response to a report of a domestic dispute, and were met by Janet Randolph. *Id.* at 107. She complained that her husband had taken their son away and further advised that her husband used cocaine and that drugs were on the premises. *Ibid.* Scott Randolph subsequently arrived, and declined to consent to a search of the house. *Ibid.* Janet Randolph, however, "readily" consented, and the police searched for and found evidence of drug use. *Ibid.*

The Court held that the officers could not rely on Janet Randolph's consent to justify the search: "[A] warrantless search of a shared dwelling for evidence over the express refusal of consent *by a physically present resident* cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." 547 U.S. at 120 (emphasis added). That conclusion rested on the Court's perception of "widely shared social expectations." *Id.* at 111. The Court explained that it is generally understood "that a solitary co-inhabitant" typically has an absolute entitlement to "admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another." *Ibid.*

The Court concluded, however, that the situation is different where one inhabitant's consent is "subject to immediate challenge by another." *Randolph*, 547 U.S. at 113. The court reasoned that "a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out.'" *Ibid.* Under those circumstances, the Court explained, "[w]ithout some very good reason, no sensible person would go inside." *Ibid.*

The Court acknowledged in *Randolph* that it was drawing a "fine line" between its holding and the previous decisions in *Matlock* and *Rodriguez*, both of which upheld consent searches despite the fact that "a potential defendant with self-interest in objecting [was] * * * nearby but not invited to take part in the threshold colloquy." *Randolph*, 547 U.S. at 121. The Court emphasized that it was not altering the rule applied in those cases. It accordingly limited its holding to circumstances (like those in *Randolph* itself) where "a potential defendant with self-interest in objecting is in fact at the door and objects." *Ibid.*

By contrast, the Court explained that it was leaving undisturbed the rule that "the potential objector, nearby but not invited to take part in the threshold colloquy, loses out." *Randolph*, 547 U.S. at 121. The Court concluded that the "formalism" of this distinction was "justified" in the interest of "the simple clarity of complementary rules": "one recognizing the cotenant's permission when there is no fellow occupant on hand" ("[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection") and the other rule "according dispositive weight to the fellow occupant's contrary indication when he expresses it." *Id.* at 121-122.

B. An Occupant's Consent To Search Is Not Rendered Invalid By The Previous Objection Of A Now-Absent Co-Occupant

Petitioner argues (Br. 15) that his objection to the officers' presence when they first appeared at his door operated as a continuing veto over Rojas's subsequent consent, which she gave as the sole occupant after petitioner was arrested and removed from the scene.

As the large majority of lower courts have concluded, see 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 8.3(d) n.54, at 205 (5th ed. 2012) (collecting cases), that contention is inconsistent with *Randolph* and the common social understandings underlying that decision.

1. The physical presence of the objecting occupant was a necessary and central component of the Court's holding in *Randolph*.

a. *Randolph*'s reliance on presence is revealed most strikingly by the Court's repeated use of the phrase "physically present" (or its substantive equivalent) throughout the opinion. At the very beginning, the Court described the question presented as whether "an evidentiary seizure is * * * lawful with the permission of one occupant when the other, who later seeks to suppress the evidence, is *present* at the scene and expressly refuses to consent." *Randolph*, 547 U.S. at 106 (emphasis added); see *id.* at 119 (similarly describing "the question in this case" as "whether a search with the consent of one co-tenant is good against another, *standing at the door* and expressly refusing consent") (emphasis added).

The Court then built physical presence into the articulation of its holding: "We hold that, in the circumstances here at issue, a *physically present* co-occupant's stated refusal to permit entry prevails." *Randolph*, 547 U.S. at 106 (emphasis added); see *id.* at 120 ("We therefore hold that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a *physically present* resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident.") (emphasis added).

The Court's supporting analysis likewise turned dispositively and explicitly on the physical presence of the objecting defendant. For example, when reviewing its prior decisions, the Court noted that "[n]one of our co-occupant consent-to-search cases * * * has presented the further fact of a second occupant *physically present* and refusing permission to search." *Randolph*, 547 U.S. at 109 (emphasis added); see *id.* at 113 (noting that previous cases "have not dealt directly with the reasonableness of police entry in reliance on consent by one occupant subject to *immediate challenge* by another") (emphasis added); *id.* at 121 (distinguishing *Matlock* as involving an "'*absent*, nonconsenting' resident) (quoting *Matlock*, 415 U.S. at 170) (emphasis added).

The Court likewise anchored its examination of social practice to physical presence, stating that a "cotenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a *present* and objecting co-tenant." *Randolph*, 547 U.S. at 114 (emphasis added); see *id.* at 121 (explaining that "to ask whether the consenting tenant has the right to admit the police when a *physically present* fellow tenant objects is not to question whether some property right may be divested by the mere objection of another") (emphasis added).[2]

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[2] The opinion includes numerous other references to physical presence as well. See *Randolph*, 547 U.S. at 108 (explaining that the Georgia Supreme Court had held that consent was not valid "in the face of the refusal of another occupant who is *physically present*" and had "stressed that the officers in *Matlock* had not been 'faced with the *physical presence* of joint occupants.'") (citations omitted; emphasis added); *ibid.* (noting Court had granted certiorari to resolve a "split of authority on whether one occupant may give law enforcement effective consent to search shared premises,

Justice Breyer, whose vote was necessary to the majority in *Randolph*, wrote a concurrence that expressly characterized the Court's holding as resting on the objecting co-tenant's physical presence. He first explained that "[i]f Fourth Amendment law forced [the Court] to choose between two bright-line rules, (1) a rule that always found one tenant's consent sufficient to justify a search without a warrant and (2) a rule that never did, [he] believe[d] [the Court] should choose the first." *Randolph*, 547 U.S. at 125. Justice Breyer explained that he would make that choice because "a rule permitting such searches can serve important law enforcement needs (for example, in domestic abuse cases), and the consenting party's joint tenancy diminishes the objecting party's reasonable expectation of privacy." *Ibid.*

But Justice Breyer explained that he did not read the Fourth Amendment as requiring a choice of such "bright-line rules" and instead permitted judgment based on the "totality of the circumstances." *Randolph*, 547 U.S. at 125-126. The first circumstance in *Randolph* noted by Justice Breyer was that the "objecting party was present and made his objection known clearly and directly to the officers seeking to enter the house." *Ibid.* Justice Breyer stressed, how-

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as against a co-tenant who is *present* and states a refusal to permit the search") (emphasis added); *id.* at 121 ("[I]f a potential defendant with self-interest in objecting is in fact *at the door* and objects, the co-tenant's permission does not suffice for a reasonable search.") (emphasis added); *ibid.* (co-tenant can validly consent "where there is no fellow occupant *on hand*") (emphasis added); *id.* at 122 ("This case invites a straightforward application of the rule that a *physically present* inhabitant's express refusal of consent to a police search is dispositive as to him.") (emphasis added).

ever, that "were the circumstances to change significantly, so should the result." *Id.* at 126. For example, Justice Breyer stated, "[t]he Court's opinion *does not apply* where the objector is not present 'and object[ing].'" *Ibid.* (quoting *id.* at 121) (second set of brackets in original; emphasis added).

b. The repeated references to a physically present co-occupant by both the Court and Justice Breyer in *Randolph* were hardly inadvertent. Rather, the "fact of a second occupant physically present and refusing permission to search" was what distinguished *Randolph* from the Court's earlier "co-occupant consent-to-search cases." 547 U.S. at 109. As examination of *Randolph* side-by-side with those cases makes clear, the specific Fourth Amendment intrusion in *Randolph* was *not* that the search occurred in the absence of the defendant's consent. *Matlock* and *Rodriguez*—both of which *Randolph* expressly preserved—expressly allowed searches based solely on the consent of a co-occupant (or putative co-occupant) and required no effort to seek the consent of the nearby defendant even though it would have been easy to do so.

Nor under the logic of *Randolph* can the simple fact of a co-occupant's objection, whenever or wherever expressed, render a search with the consent of another occupant unlawful. Were that the case, the opinion in *Randolph* would have had no need to emphasize (repeatedly) that the objecting occupant was "physically present." The *Randolph* Court could easily have disposed of the case simply by holding that, once voiced, the objection of an occupant trumps *any* subsequent consent by a co-occupant.

The *Randolph* Court instead went to great pains to emphasize that the objecting co-occupant was both

present at the time of the search and contemporaneously objecting to it. The Court's focus on an objector who is "physically present" accordingly makes clear that the unreasonableness of a search over such objection flows not from the override of the defendant's wishes, but rather from the indignity suffered when such an override occurs before the defendant's eyes while he stands in the sanctuary of his own home. See *United States* v. *Henderson*, 536 F.3d 776, 783-784 (7th Cir. 2008), cert. denied, 558 U.S. 830 (2009). That specific dignity interest is not implicated when the search takes place in the defendant's absence.

c. Petitioner's rule—that one tenant can foreclose a co-tenant's ability to give valid consent, regardless of whether he is physically present—would unreasonably impinge on the dignity interests of the *consenting* co-occupant. As this Court has explained, "[i]n a society based on law, the concept of agreement and consent should be given a weight and dignity of its own." *United States* v. *Drayton*, 536 U.S. 194, 207 (2002). "It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding." *Ibid.*

In the particular context of consent searches involving co-tenants, this Court has applied that principle by holding that each co-tenant "has the right to permit the inspection *in his own right*." *Matlock*, 415 U.S. at 171 n.7 (emphasis added). Yet the unilateral ability of an objecting occupant to prospectively invalidate a search authorized by another resident affords the objecting tenant a permanent pocket veto over his co-tenant's wishes. That outcome effectively eliminates the co-tenant's independent right to permit the search and unreasonably impinges on her dignity

interest in making her own decisions about whom she will admit to her home.

Petitioner's rule would also hinder one co-tenant's ability to have contraband or evidence of crime removed from her house and thus "deflect suspicion raised by sharing quarters with a criminal." *Randolph*, 547 U.S. at 116. Indeed, the innocent co-tenant's need to consent for this reason may be more imperative when the guilty co-tenant is absent, thus leaving her in exclusive control of the premises and raising a stronger inference that items found there are hers. And in this case, Rojas had the additional legitimate interest in having a sawed-off shotgun removed from the residence in which she lived with her young children.

The interests of the remaining occupant are particularly compelling in a case like this one (and many others involving consent searches) that involve domestic violence. In *Randolph*, the Chief Justice noted in his dissent that the courts had faced "recurring cases in which abused spouses seek to authorize police entry into a home they share with a nonconsenting abuser." 547 U.S. at 127. He criticized the majority's rule for "forbid[ing] police from entering to assist with a domestic dispute if the abuser whose behavior prompted the request for police assistance objects." *Id.* at 139 (Roberts, C.J., dissenting). In response, the majority "recognize[d] that domestic abuse is a serious problem in the United States" but explained that it did not believe that the rule it was adopting had "bearing on the capacity of the police to protect domestic victims." *Id.* at 117-118. In particular, the majority acknowledged "the possibility that a battered individual will be afraid to express fear candidly" but thought *Ran-*

dolph's holding would not influence her choices because such a fearful individual would be unlikely to consent to a search with her abuser standing nearby and objecting. *Id.* at 119 n.7.

That calculus by the victim may change, however, when the abuser is absent. Here, for example, Rojas consented to a search of the apartment after petitioner had been arrested and removed from the scene, thus ensuring that (at least temporarily) he was no longer a threat to her. It would disserve the interests of Rojas (and those of other victims of domestic violence) to hold that her abuser's previous objection would continue to control her choices about whom she admitted to her own home even after he was gone.

2. This understanding of the *Randolph* exception as requiring the physical presence of the objector is reinforced by that decision's focus on "widely shared social expectations." 547 U.S. at 111.

a. As the Court in *Randolph* explained, *Matlock* held that the reasonableness of searches based on third-party consent "is in significant part a function of commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other's interest." 547 U.S. at 111. Thus, *Randolph* explained, *Matlock* made clear that when people share quarters, they understand that "any one of them may admit visitors" and assume the risk that "a guest obnoxious to one may nevertheless be admitted in his absence by another." *Ibid.*

Randolph stated that social expectations are different when an invitation to enter extended by one occupant is immediately disputed by a physically present co-occupant. "[I]t is fair to say," the Court reasoned, "that a caller standing at the door of shared

premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out.'" 547 U.S. at 113. In those circumstances, the Court concluded, "[w]ithout some very good reason, no sensible person would go inside." *Ibid.*

No such social expectation of exclusion holds when the objecting occupant is absent when a co-occupant invites a caller inside. Without the objector's presence, a caller would feel free to enter, especially where the likelihood is small that the objecting co-occupant will immediately return. Under those circumstances, the normal rule that "a guest obnoxious to one may nevertheless be admitted in his absence by another" holds. *Randolph*, 547 U.S. at 111.[3] And, under the Fourth Amendment, that means that the absent resident has "assumed the risk" that his

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[3] See *United States* v. *Cooke*, 674 F.3d 491, 499 (5th Cir.) ("[S]ocial convention normally allows for a visitor to feel invited into a home when invited by a physically-present resident, even if an absent cotenant objects to it, rather than the visitor's assuming he is *verboten* forever until the objector consents."), cert. denied, 133 S. Ct. 756 (2012); *Henderson*, 536 F.3d at 783 (While "a third party, attuned to societal customs regarding shared premises, would not * * * enter when faced with a disputed invitation between cotenants," "[t]he calculus shifts * * * when the tenant seeking to deny entry is no longer present."); *id.* at 785 ("We know of no social convention that requires the visitor to abstain from entering once the objector is no longer on the premises; stated differently, social custom does not vest the objection with perpetual effectiveness"); *United States* v. *Hudspeth*, 518 F.3d 954, 960 (8th Cir. 2008) (en banc) (Because defendant, who had earlier objected at the police station to a search of his residence, was not physically present when his wife gave consent to a police search, the police officers, unlike in *Randolph*, "were not confronted with a 'social custom' dilemma").

co-tenant "might permit the common area to be searched." *Matlock*, 415 U.S. at 171 n.7.

Here, for example, suppose a friend of Rojas's, whose entry petitioner had earlier barred, appeared on the doorstep soon after petitioner had been arrested and removed from the scene. If Rojas explained that petitioner had just been arrested and invited her friend inside to talk about it, the friend would have felt free to enter. This is particularly so because it would have been plain to both Rojas and her friend that petitioner's return was not imminent. The logic of *Randolph*'s analysis of social expectations thus leads to the conclusion that Rojas could likewise admit the police.[4]

b. Petitioner argues (Br. 17-18) that once a tenant objects to a caller's entry, the societal understanding is that, even in the objector's absence, the caller will entertain doubts as to his permission to enter that cannot be dispelled until he has obtained "assurance,

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[4] Amicus National Association of Criminal Defense Lawyers (NACDL) argues that the relevant inquiry is whether there is any social expectation permitting a social visitor to remove the objector from the scene and then seek consent to enter from a co-occupant. *E.g.*, NACDL Br. 8. But the relevant inquiry is not whether there exists any societal understanding that would allow a social visitor to mimic police action in any given situation. Instead, the inquiry is based on social expectations about admission of guests into a residence. This Court in *Randolph*, explaining its earlier decision in *Matlock*, said that the rule that any co-tenant can consent to a search was based on the social understanding that any resident of a shared premises "may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another." 547 U.S. at 111. The Court did not require a common social understanding that a co-tenant may admit a visitor to search her roommate's effects for evidence of a crime.

either directly from the objector or from the co-tenant, that the objector no longer seeks to keep [him] out of the house" (Br. 17). Petitioner relies (*ibid.*) on the Court's observation in *Randolph* (547 U.S. at 114) that, if a caller is greeted at the door of shared premises and one occupant invites him in and the other tells him to stay out, a resolution of the disagreement "must come through voluntary accommodation, not by appeals to authority."

Contrary to petitioner's suggestion, the Court's point was that, unless the physically present, disagreeing occupants voluntarily agree on whether or not to admit the caller, the caller would not feel free to enter *at that time*. The Court was surely not characterizing common social understandings as embodying a rule that an occupant cannot *ever* give consent to entry—even in the objecting occupant's absence—unless the objecting occupant has changed his mind.

c. Amicus National Association of Criminal Defense Lawyers (NACDL) discusses property law principles at length in an attempt to support the proposition that the "prior objection of one co-tenant renders a later invitation from another ineffective." NACDL Br. 17; see *id.* at 17-23. That discussion is not informative because this Court has squarely held that the common "authority which justifies the third-party consent does *not* rest upon the law of property, with its attendant historical and legal refinements." *Matlock*, 415 U.S. at 171 n.7 (emphasis added); see *Randolph*, 547 U.S. at 110 ("[T]he third party's 'common authority' is not synonymous with a technical property interest.").

In any event, the bulk of the authority cited by NACDL involves irrelevant issues, such as the inabil-

ity of one joint tenant to enter into contracts that would destroy or encumber another joint tenant's interest in property. *E.g.*, NACDL Br. 20 ("The common law * * * has forbidden co-tenants from corrupting or destroying shared property."). This case does not implicate those property-law principles because it involves mere entry into shared premises. In that situation, "[i]t is ordinarily held" under property law "that a tenant in common may properly license a third person to enter on the common property" and that "[t]he licensee, in making an entry in the exercise of his or her license, is not liable in trespass to nonconsenting cotenants." 86 C.J.S. *Tenancy in Common* § 144, at 354 (2006); see *Buchanan* v. *Jencks*, 96 A. 307, 309, 310-311 (R.I. 1916) ("[I]t would seem unreasonable to say that a cotenant could not authorize another to go upon the common land and do anything that he might do himself."); *Lee Chuck* v. *Quan Wo Chong*, 28 P. 45, 46 (Cal. 1891); see also *Dinsmore* v. *Renfroe*, 225 P. 886, 888-889 (Cal. Dist. Ct. App. 1924); *Causee* v. *Anders*, 20 N.C. (3 & 4 Dev. & Bat.) 388 (N.C. 1839) (affirming that tenant in common has right to enter property and take with him a guest).[5]

C. Reading The Physical Presence Requirement Out Of *Randolph* Would Raise Questions Incapable Of Easy Or Principled Resolution

1. To read the physical presence requirement out of *Randolph* would raise numerous questions that

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[5] NACDL cites a property treatise for the contrary proposition, see Br. 18 (quoting 2 H. Thorndike Tiffany & B. Jones, *The Law of Real Property* § 457 (3d ed. 1939) (Tiffany)), but that treatise qualifies its point by acknowledging that it had located "little authority" on the question, Tiffany § 457, at 274.

could not be resolved without arbitrary, irrational, or confusing answers. In particular, "[i]f an objecting co-occupant's presence is not required, are there any limits to the superiority or duration of his objection?" *Henderson*, 536 F.3d at 784. On the one hand, courts could adopt a categorical rule that an occupant's objection controls forever. So, for example, cold-case investigators returning to a house ten years after a co-occupant (now incarcerated on different charges) had objected to a search could not validly obtain the consent of his girlfriend to search. Such a rule would plainly be unreasonable.

On the other hand, courts could attempt to specify a period of time within which one occupant's refusal of consent would trump the consent of a co-occupant. But adoption of such an expiration-date approach would present its own difficulties. While the Court on occasion has "set forth precise time limits governing police action," it is "certainly unusual" for it to do so. *Maryland* v. *Shatzer*, 559 U.S. 98, 110 (2010); see *County of Riverside* v. *McLaughlin*, 500 U.S. 44, 56 (1991) ("[W]e hesitate to announce that the Constitution compels a specific time limit [as to what is permissible under the Fourth Amendment]."). Here, no Fourth Amendment principle would permit courts to say how long the controlling force of an objection would linger.

If an objection by one occupant prevails in his absence over a co-occupant's consent, other questions would have to be addressed as well. For example, "[w]hat circumstances (if any) operate to reinstate a co-occupant's authority to consent to a search?" *Henderson*, 536 F.3d at 784. "Must a suspect expressly indicate that he has changed his mind in the future, or

may that be assessed from the totality of the circumstances?" *United States* v. *Shrader*, 675 F.3d 300, 307 (4th Cir.), cert. denied, 133 S. Ct. 757 (2012). What if the officers who seek the consent of a co-occupant are not the ones who earlier sought consent from the defendant and heard his objection? Would an earlier group of officers have a Fourth Amendment obligation to convey that fact to a later group? In addition, "[m]ay an occupant arrested or interviewed away from the home preemptively object to a police request to search and effectively disable his co-occupants from consenting even in his absence?" *Henderson*, 536 F.3d at 784.

Existing Fourth Amendment principles would not provide ready answers to such questions. The need to answer them would thus produce an outpouring of fine-spun and likely conflicting judicial decisions on suppression motions, leaving officers without clear guidance as to when—or if—they can ask another occupant for consent to search following the objection of one occupant. Cf. *New York* v. *Belton*, 453 U.S. 454, 458 (1981) ("A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.") (alteration and citation omitted).

The resulting confusion would wholly undermine *Randolph*'s stated goal of adhering to "the simple clarity of complementary rules." 547 U.S. at 121; see *State* v. *Martin*, 800 N.W.2d 858, 861 (Wis. 2011) ("[T]he 'simple clarity' of [the] rules [in *Matlock* and *Randolph*] is lost if the requirement that the resident is 'physically present' is not actually applied."), cert. denied, 132 S. Ct. 1003 (2012); see also *Shrader*,

675 F.3d at 307-308 ("[Petitioner's] interpretation of *Randolph* would involve courts in such questions, diverting attention from the basic social expectations that underlie not only the opinion in *Randolph*, but the larger corpus of Fourth Amendment jurisprudence.").

2. Petitioner makes his own administrability arguments, suggesting (Br. 24-25) that allowing an occupant's objection to trump a co-occupant's consent only so long as the objector remains physically present would invite the police to seek consent from a co-occupant after the objector had moved to another part of the house. That concern is unfounded. *Randolph* plainly contemplates that when an occupant on the scene has voiced an objection to a search, that objection will trump a co-occupant's consent so long as the objecting occupant remains on the premises.

Petitioner separately professes concern that the police might wait until the objector voluntarily leaves the premises before seeking a co-occupant's consent, thus making a "mockery of *Randolph*" (Br. 9). But the permissibility of soliciting consent under those circumstances is the necessary result of the "formalism" deliberately adopted by *Randolph*. 547 U.S. at 121. The Court there made clear that "the potential objector, nearby but not invited to take part in the threshold colloquy loses out," *ibid.*, and that result was a logical consequence of preserving the rule that each co-occupant can consent to search in her own right. That rule would dictate the result in petitioner's hypothetical as well. When the objecting occupant is no longer present, a search conducted pursuant to a co-occupant's consent does not intrude on the objector's right to experience privacy in his home free

from the presence of unwanted guests. At the same time, permitting a search under such circumstances recognizes the separate interests of the remaining resident in authorizing entry into her home.

D. That It Is The Police Who Remove The Objector From The Scene Does Not Invalidate A Co-Occupant's Subsequent Consent

Petitioner alternatively argues (Br. 19-20) that even if, as a general matter, the police can return to a residence after the objecting occupant is no longer present and obtain consent to enter from a co-occupant, they may not validly obtain such consent when they have created the objector's absence by arresting him. Petitioner is mistaken.

In *Randolph*, the Court explicitly preserved the rule that a "co-tenant's permission" would be dispositive "when there is no fellow occupant on hand" but qualified that statement as follows: "[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection." 547 U.S. at 121. That qualification was dictum; the defendant in *Randolph* had not been removed and, as the Court repeatedly emphasized, was physically present and objecting. Nor do the facts of this case implicate the *Randolph* dictum. Petitioner has not alleged that the police removed him from the scene for the purpose of vitiating his previous objection to search.

In any event, the statement in *Randolph* about police removal is best understood as reserving the possibility that if the police remove an objecting occupant from the residence for the purpose of avoiding an objection, but have no objective justification for doing so, consent obtained from another tenant in his ab-

sence will not be valid. A contrary reading of the *Randolph* dictum making the officers' subjective intent dispositive would conflict with settled Fourth Amendment law.

As petitioner himself acknowledges (Br. 25), this Court has long "been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers." *Whren* v. *United States*, 517 U.S. 806, 813 (1996). The Court thus has "repeatedly rejected" Fourth Amendment tests that turn on a police officer's subjective intent. *Kentucky* v. *King*, 131 S. Ct. 1849, 1859 (2011).

No different rule should apply to searches conducted pursuant to an occupant's consent when an objecting co-occupant's absence was caused by his arrest. Where, as here, the police have probable cause to arrest the objecting occupant, no inquiry into their subjective motives is warranted. See *Shrader*, 675 F.3d at 307 (Because the police went to the house to execute a valid warrant for defendant's arrest, "his subsequent arrest and removal from the premises cannot be considered a pretext for later seeking consent from his aunt.").[6] And when the objector is absent, whether the absence is caused by a legal arrest or some other reason, he is "subject to the assumption tenants usually make about their common authority when they share quarters," *i.e.*, that "any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another." *Randolph*, 547 U.S. at 111.

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[6] In this case, the police had two independent bases for arresting petitioner: the evidence of his battery of Rojas and the robbery victim's identification. See p. 3, *supra*.

Petitioner asserts (Br. 19) that by forcibly removing him from the home, the police prevented him "from taking any unilateral steps that a person might typically take in this situation to protect the privacy of his belongings—for example, locking up personal items, removing them from the premises, or even moving out and finding a new place to live." But the police never prevented petitioner from taking these precautionary steps to protect his privacy interests. The police did not cause petitioner to enter into a living arrangement in which Rojas could admit visitors or consent to a search of the common areas, and they did not prevent him from extricating himself from that arrangement if he no longer wished Rojas to have such authority. Nor was it police conduct that gave rise to probable cause for an arrest and to the need to remove him from the scene of domestic violence. Petitioner produced those justifications on his own.

Petitioner's argument, moreover, rests on the mistaken assumption that, by arresting him, the police *unfairly* deprived him of advance notice he needed to thwart the search. The Fourth Amendment is not designed to protect an individual's ability to remove or destroy evidence or contraband. See *Segura* v. *United States*, 468 U.S. 796, 815-816 (1984) (rejecting argument that illegal entry was "'but for' causes of the discovery of the evidence in that, had the agents not entered the apartment," the defendants "could have removed or destroyed the evidence" on the ground that exclusionary rule should not be "extend[ed]" to "further 'protect' criminal activity").

E. The Possibility Of Alternative Means Of Obtaining Evidence Does Not Undermine Legitimate Third Party Consent

Petitioner (Br. 14, 30-31) argues that, given "the Fourth Amendment's traditional hostility to police entry of a house without a warrant," and given the availability to the police of less intrusive means to acquire the evidence in question, it was unreasonable for the police to have sought Rojas's consent knowing that petitioner had effectively objected to a search. Thus, both petitioner (Br. 30-31) and NACDL (Br. 24-30) assert that, because the probable cause that supported petitioner's arrest also provided grounds to obtain a warrant, the police should have been required to do so.

That suggestion provides no basis for a Fourth Amendment rule precluding a consent search. As an initial matter, when the police seek a co-occupant's consent in the absence of the objector, the objector's absence will not always be explained by his arrest. The police thus may not have the requisite probable cause to obtain a warrant. In that case, a consent search may be the only means available to bring an investigation to a successful close.

More fundamentally, this Court has explained that "[t]here are many entirely proper reasons why police may not want to seek a search warrant as soon as the bare minimum of evidence needed to establish probable cause is acquired." *King*, 131 S. Ct. at 1860. For example, "the police may want to ask an occupant of the premises for consent to search because doing so is simpler, faster, and less burdensome than applying for a warrant." *Ibid.* Moreover, if police conduct a consent search that "proves fruitless," they may decide

that "a far more extensive search pursuant to a warrant is not justified." *Schneckloth*, 412 U.S. at 228. A consent search, in short, "may result in considerably less inconvenience for the subject of the search." *Ibid.*

Petitioner further urges (Br. 20-23) that, even absent the probable cause necessary to obtain a warrant, the police may have other alternatives to obtain evidence. One option, he suggests, would be for the police to talk to the arrestee and try anew for his consent. Another would be for the police to enlist a cooperative co-tenant to speak to the objector to facilitate agreement. Or, he posits, the non-objecting tenant might be willing either to share information that would enable the police to obtain a warrant, or to deliver evidence directly to the police.

Defendants "engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." *United States* v. *Sharpe*, 470 U.S. 675, 686-687 (1985). But this Court "has 'repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment.'" *City of Ontario* v. *Quon*, 130 S. Ct. 2619, 2632 (2010) (quoting *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 663 (1995)). Such a rule, the Court has explained, "would unduly hamper the police's ability to make swift, on-the-spot decisions * * * and it would require courts to indulge in unrealistic second-guessing." *United States* v. *Sokolow*, 490 U.S. 1, 11 (1989) (internal quotation marks and citation omitted). Indeed, "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *United*

States v. *Martinez-Fuerte*, 428 U.S. 543, 557 n.12 (1976); see *Quon*, 130 S. Ct. at 2632.

Moreover, petitioner's argument proceeds from the premise that a consent search conducted over the objection of an absent tenant should be discouraged. The Fourth Amendment recognizes the profound interests in privacy centering on an individual's home. See, *e.g.*, *Florida* v. *Jardines*, 133 S. Ct. 1409, 1414 (2013); *Randolph*, 547 U.S. at 109. But the Fourth Amendment does not erect a barrier against an entry into a home with the consent of an occupant. Rather, seeking consent—even third-party consent—"is a constitutionally permissible and wholly legitimate aspect of effective police activity." *Schneckloth*, 412 U.S. at 228; see *Henderson*, 536 F.3d at 785 ("[C]onsent searches are in no general sense constitutionally disfavored."). Nothing in the Fourth Amendment is designed to discourage citizens from consenting to searches to aid in the apprehension of criminals. "Rather," as the Court in *Schneckloth* observed, "the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense." 412 U.S. at 243.

CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 12-7822

IN THE

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WALTER FERNANDEZ,
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v.

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Respondent.

On Writ of Certiorari to the California Court of Appeal, Second District

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Once a co-tenant has expressly told police officers that they may not enter his home, does the Fourth Amendment allow the officers to obtain valid consent to do so by removing the objecting tenant from the scene against his will and then seeking permission from the other tenant shortly thereafter?

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IN THE

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit national bar association working in the interest of criminal defense attorneys and their clients. NACDL was founded to ensure justice and

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation and submission of this brief, and no person other than *amicus*, its members, or its counsel made such a contribution. All parties consented to the filing of this brief. Copies of the letters granting consent have been filed with the Clerk.

due process for persons accused of crimes and to foster the integrity, independence, and expertise of the criminal defense profession. NACDL has more than 12,500 members—joined by 90 affiliate organizations with up to 40,000 members—including criminal defense lawyers, U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system.

This case concerns whether the Fourth Amendment permits the police to make a warrantless entry into the home of a potential criminal defendant over his express objection. The police made that entry, notwithstanding the rule of *Georgia* v. *Randolph*, 547 U.S. 103 (2006), by arresting the defendant, forcibly removing him, and then seeking consent to search from another occupant of the dwelling. NACDL and its members have a strong interest in ensuring proper application of Fourth Amendment principles in this context and in ensuring that the law accords appropriate respect to an individual's invocation of his constitutional right to exclude others from the sanctuary of his home. NACDL has appeared as *amicus curiae* in numerous Fourth Amendment cases in this Court, including *Randolph*, *supra*; *Missouri* v. *McNeely*, 133 S. Ct. 1552 (2013); *Florida* v. *Jardines*, 133 S. Ct. 1409 (2013); *Florida* v. *Harris*, 133 S. Ct. 1050 (2013); *United States* v. *Jones*, 132 S. Ct. 945 (2012); and *Arizona* v. *Gant*, 556 U.S. 332 (2009).

STATEMENT

Shortly after noon on October 12, 2009, Detectives Joseph Cirrito and Kelly Clark of the Los Angeles Police Department's Olympic Gang Enforcement Detail heard a radio dispatch about a knife assault, possibly involving members of the Drifters gang. J.A. 5, 57. The report described a bald suspect, with an "L.A." tattoo on his head,

wearing a light grey sweater. J.A. 4, 58. Other units responded to the crime scene; Detectives Cirrito and Clark drove to an alley behind a nearby apartment building where they thought members of the Drifters often gathered. In the alley, Cirrito saw a man wearing a light blue shirt and khaki pants run across the alley, climb the back stairway of the apartment building, and disappear inside a second-story unit. J.A. 60, 71-72. Cirrito radioed officers at the scene to inform them he may have located a possible suspect. J.A. 60.

Moments later, the detectives heard yelling emanating from the apartment the man had entered. J.A. 62, 75. Cirrito radioed for backup. *Ibid.* Additional units arrived, and Cirrito—now accompanied by at least four other officers—climbed the building's back stairs and knocked on the back door of the apartment. A young woman holding an infant opened the door. The bridge of her nose was swollen, and what appeared to be fresh blood was smeared on her hands and shirt. J.A. 63. The officers asked the woman—later identified as Roxanne Rojas, petitioner's girlfriend—what was wrong. Petitioner then appeared in the apartment's kitchen, unarmed, wearing nothing but boxer shorts, and apparently sweating. J.A. 64. Cirrito asked petitioner to step outside the apartment, to which he replied, "I know my constitutional rights. You can't come in." J.A. 77.

Suspecting petitioner had battered Ms. Rojas, Cirrito and another detective entered the apartment, restrained petitioner, handcuffed him, and led him down the back stairs into the alleyway. J.A. 77-78. While walking down the stairs behind petitioner, Cirrito noticed a stylized "L.A." tattoo atop his bald head. J.A. 65. The officers at the scene of the earlier knife assault then escorted the victim of the knife attack to the alley to identify peti-

tioner (who was still wearing nothing but boxer shorts). The victim identified petitioner as one of the assailants. J.A. 78-79.

Meanwhile, police officers remained in the second-floor apartment that petitioner shared with Ms. Rojas, their infant, and Ms. Rojas's four-year-old son. J.A. 94, 101. After the victim of the knife assault identified petitioner as one of his assailants, Detectives Cirrito and Clark returned to the apartment to seek Ms. Rojas's consent to search. J.A. 127. Clark took the four-year-old to a separate room for questioning, while Cirrito remained with Ms. Rojas. Ms. Rojas objected that the police could not question her child without her present. J.A. 93, 98-99. Cirrito responded that, if Ms. Rojas continued to object, the Department of Children and Family Services could take custody of her children. J.A. 93. Ms. Rojas relented, and shortly thereafter signed a form granting consent for the police to search the apartment. J.A. 93-94, 99-100. At the time the form was executed, somewhere between just under an hour and about two hours had lapsed following petitioner's arrest. J.A. 81, 94, 101. None of the numerous detectives and officers on the scene ever sought or obtained a search warrant.

During the search, officers found a butterfly knife and clothing purportedly used in the assault that morning. They also located Drifters paraphernalia, boxing gloves, and a sawed-off shotgun. J.A. 7. Following petitioner's unsuccessful attempt to suppress the fruits of the warrantless search, petitioner was convicted of robbery with findings that he had used a deadly weapon and acted with or for the benefit of a gang. J.A. 14-15. Petitioner was also convicted on one count of corporal injury on a spouse, cohabitant, or child's parent. J.A. 14. Petitioner pled *nolo contendere* to firearms charges in connection

with the shotgun found by the officers during their search. *Ibid.*

SUMMARY OF ARGUMENT

I. The Fourth Amendment forbids government agents from conducting a warrantless search of an individual's home—despite his clear objection—by arresting him, removing him from the scene, and then seeking consent for the search from another occupant.

A. The reasonableness of a warrantless search, even one based on the consent of a third party, is measured by the yardstick of "widely shared social expectations." *Georgia* v. *Randolph*, 547 U.S. 103, 111 (2006). There can be no doubt that our society has profound respect for the sanctity and privacy of the home and the possessions kept there. As a result, an individual's affirmative effort to exclude outsiders from his home should command great respect. Consistent with that, this Court held in *Randolph* that no sensible person would think himself entitled to enter a home, over the protest of a present and objecting resident, simply because another occupant consented to the entry.

Likewise, no sensible visitor confronted with an occupant's objection to entry would think it permissible to forcibly remove the objector and then obtain permission to enter from the remaining co-occupant. Allowing a warrantless search in those circumstances would demean not only the sanctity of the home, but also the legitimacy of consent between private citizens and the police. That legitimacy depends on the expectation that police will equally honor an individual's decision to consent and a decision to withhold consent. When police ignore an individual's decision to assert his constitutional right to exclude them from his home, personal autonomy suffers. Relations between the government and its citizens are

undermined as well. When the citizen advises the police of his choice and the police, rather than respect that decision, override it and enter his home nonetheless, it sends a clear message that individual choice will be respected only when it suits the government's purposes; when it does not, the police will engineer other means to the same end. That is anathema to the individual sovereignty over personal property and private affairs on which our Nation was founded. Moreover, other occupants—having seen the police arrest an objecting resident, take him away, and then turn to them for consent—may well conclude that they have no meaningful choice because their decision to refuse entry will not be respected either.

B. Longstanding principles of property law reinforce those social expectations. The right to exclude is an essential property right shared by co-tenants. It may be reasonable to assume that, in general, each co-tenant has authority to license entry by strangers on behalf of all. But once a resident clearly objects to entry, no such authority can be inferred. To the contrary, the law has long been clear that one co-tenant cannot unilaterally license strangers to enter the common property over another cotenant's objection. The law thus reflects the social understandings we all share: No reasonable person, having heard one resident prohibit entry, could conclude that it is permissible to accept another resident's license to enter nonetheless. Moreover, property law forbids one cotenant from acting to prejudice or diminish another's interests. Allowing one tenant to forever destroy a cotenant's privacy interests by admitting the police over his express objection cannot be squared with that prohibition.

II. There is no practical necessity to permit the kind of warrantless search that occurred here. The law amply

accommodates the needs of law enforcement without sanctioning the warrantless invasion of the most private of places—the home.

A. Where there is probable cause to arrest an individual at his residence, very often there will be probable cause to obtain a warrant to search the premises as well. Accordingly, the police generally can (and should) obtain a warrant, rather than rely on disputed permission to conduct a search. Even where a warrant is not readily available, well established exceptions to the warrant requirement—such as exigent circumstances, hot pursuit, and plain view—accommodate the needs of law enforcement and public safety without denigrating the right to refuse consent.

B. The minimal administrative burdens involved in applying for a search warrant provide no reason to excuse the failure to obtain one. Magistrates historically have been willing to grant most warrant applications. And advances in both technology and legislation enable police to use telephones, e-mail, and other tools to apply for and receive search warrants in a matter of minutes—without ever leaving the scene of the investigation.

C. The Fourth Amendment's balance of private and governmental interests tips strongly in favor of adhering to the warrant requirement. Allowing warrantless searches like the one here would damage weighty interests in personal privacy and security in the home. It would also offend norms of civic responsibility and mutual respect that are fundamental to our society. By contrast, allowing warrantless searches on disputed consent does not meaningfully advance any legitimate law enforcement interest.

ARGUMENT

In *Georgia* v. *Randolph*, 547 U.S. 103 (2006), this Court held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." *Id.* at 120. The Court recognized "the great significance given to widely shared social expectations" in assessing the reasonableness of a search based on putative consent. *Id.* at 111. Those expectations are "influenced by the law of property," though not strictly "controlled by its rules." *Ibid.* Examining common social understandings and common-law property principles, this Court concluded that "the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant." *Id.* at 114. As a result, "[d]isputed permission" cannot justify police entry into or search of a private residence. *Id.* at 115.

The decision below defies those principles. Here, no less than in *Randolph*, shared social understandings reflected in real property law preclude the police from executing warrantless searches of the home based on disputed consent. Petitioner was "physically present" at his home and "express[ly] refused" to allow the police to enter. *Randolph*, 547 U.S. at 120. The fact that the police "arrested [petitioner] and removed [him] from the apartment," so that he was "no longer present," J.A. 31, 32, did not deprive him of the right to bar a search of his home. Neither common social understandings nor the law of property allows an outsider to override a resident's explicit exercise of his right to exclude by removing the objecting resident and then entering on the permission of another occupant. To the contrary, given the enormous

respect society accords the sanctity of the home, an individual's decision regarding who will and will not be admitted must be honored. Where the police exceed "[t]he scope of a license—express or implied"—to enter a private home, social understandings as well as principles of property law compel the conclusion that "the officer[s'] conduct was [not] an objectively reasonable search." *Florida* v. *Jardines*, 133 S. Ct. 1409, 1416, 1417 (2013).

I. SHARED SOCIAL UNDERSTANDINGS REFLECTED IN PROPERTY LAW DEMAND THAT OFFICERS RESPECT AN INDIVIDUAL'S PENDING ASSERTION OF HIS RIGHT TO EXCLUDE OUTSIDERS FROM HIS HOME

The Fourth Amendment protects against unreasonable government intrusions on privacy expectations "that society is prepared to recognize as 'reasonable.'" *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Legitimate expectations of privacy are shaped by "understandings that are recognized and permitted by society" and by "concepts of real or personal property law," although an expectation "need not be based on a common-law [property] interest" to be protected. *Rakas* v. *Illinois*, 439 U.S. 128, 143 n.12 (1978). Whether a search based on putative consent is "reasonable" likewise depends on "widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules." *Randolph*, 547 U.S. at 111; see *United States* v. *Matlock*, 415 U.S. 164, 171 n.7 (1974). Here, social understandings and property law point decidedly in the same direction: Once a resident tells the police he does not consent to entry or search of his home, they may not procure his absence through an arrest and then exploit that absence by obtaining consent to search from one of his co-tenants.

A. Respect For The Sanctity Of The Home And Self-Determination Bar Warrantless Entry Following The Involuntary Removal Of An Objecting Resident

The social expectations underlying *Randolph* reduce to this: "[N]o sensible person would go inside" shared premises upon "one occupant's invitation" where "a fellow tenant stood there saying, 'stay out.'" 547 U.S. at 113. That understanding flows from our society's recognition that one's home is his castle, the place where his personal autonomy and right to exclude others—not least the state—are at their zenith.

1. This Court has repeatedly recognized the special status of the home, and the sanctity of the privacy we seek for ourselves and our possessions therein. "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion.'" *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman* v. *United States*, 365 U.S. 505, 511 (1961)). The home is not merely "the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits," *Carey* v. *Brown*, 447 U.S. 455, 471 (1980), but also where individuals keep the "intimate details" of their lives, *Kyllo*, 533 U.S. at 37; see *Minnesota* v. *Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring) ("[I]t is beyond dispute that the home is entitled to special protection as the center of the private lives of our people."); *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B. 1604) ("[T]he house of every one is to him as his castle and fortress, as well as for his defence against injury and violence, as for his repose.").

Within the sanctity of the home, "*all* details are intimate details"—even those as seemingly mundane as the

"rug on the vestibule floor" or "the registration number of a phonograph turntable." *Kyllo*, 533 U.S. at 37-38. Residents reasonably expect that those details will remain "safe from prying * * * eyes," if for no other reason than that they are in their homes. *Id.* at 37. Society rightfully respects the right to shield one's home, and the effects therein, from the view of outsiders.

A person who chooses to share his quarters with another necessarily surrenders some of that privacy—both to his co-occupant and to those the co-occupant may admit without his knowledge. See *United States* v. *Matlock*, 415 U.S. 164, 170-171 (1974). But that does not diminish his ability to stand at the door of "his castle" and "bid defiance to all the forces of the Crown," *Miller* v. *United States*, 357 U.S. 301, 307 (1958) (quotation marks omitted). To the contrary, society continues to recognize that an individual's decision to *affirmatively refuse* others entry into his home is entitled to significant—indeed, controlling—weight. Thus, where co-occupants disagree over whether to admit an outsider to their shared residence, the balance is struck in favor of preserving privacy in the home. See *Randolph*, 547 U.S. at 115.

This Court has long recognized that "the Fourth Amendment draws 'a firm line at the entrance to the house.'" *Kyllo*, 533 U.S. at 39-40 (quoting *Payton* v. *New York*, 445 U.S. 573, 590 (1980)). Police conduct that normally would not even implicate the Fourth Amendment may nevertheless violate it when that conduct occurs at the home. Contrast *Illinois* v. *Caballes*, 543 U.S. 405, 408-409 (2005) ("the use of a well-trained narcotics-detection dog * * * during a lawful traffic stop, generally does not implicate legitimate privacy interests" and thus "is not a search subject to the Fourth Amendment"), with *Jardines*, 133 S. Ct. at 1414 (use of drug-sniffing dog "in

the curtilage of the house, which * * * enjoys protection as part of the home itself," constitutes "a search within the meaning of the Fourth Amendment"). And, "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo*, 533 U.S. at 31. Other constitutional guarantees, this Court has held, also carry special force within the home. See, *e.g.*, *Stanley* v. *Georgia*, 394 U.S. 557, 565 (1969) ("Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."); *Lawrence* v. *Texas*, 539 U.S. 558, 567 (2003) ("adults may choose to enter upon [a sexual] relationship in the confines of their homes and their own private lives").

Those principles make clear that neither common social understandings nor the Fourth Amendment permits police entry in the circumstances here. No sensible person, faced with a deadlock between one inviting and one objecting occupant, would think himself entitled to break the tie and enter the home by forcibly removing the objecting co-occupant. "There is no customary invitation to do *that*." *Jardines*, 133 S. Ct. at 1416.[2] To the contrary, society's unique respect for the sanctity of the home demands that "when people living together disagree over the use of their common quarters, a resolution must come

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[2] Here, moreover, the police confronted petitioner's *uncontradicted* objection to entry at the outset. They then removed petitioner and created a conflict between him and Ms. Rojas by seeking her consent after his arrest. See J.A. 31. There is no social understanding that would allow any outsider to do that.

through voluntary accommodation, *not by appeals to authority*." *Randolph*, 547 U.S. at 113-114 (emphasis added). Just as one co-occupant cannot "pull rank" and admit an outsider over the objection of another, see *id.* at 114, neither may *the outsider* engineer his own admission by asserting the authority of the state and silencing the objecting co-occupant through forcible removal. *Randolph* makes clear that only the objecting occupant, not the state, has the power to end a doorway impasse.

2. This case concerns not only society's respect for the sanctity of the home, but also its respect for the individual's right to make his own decisions by granting or refusing consent. "In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own." *United States* v. *Drayton*, 536 U.S. 194, 207 (2002). Police officers thus "act in full accord with the law when they ask citizens for consent." *Ibid.* Such requests affirm the citizen's sovereignty over his personal property and private affairs. And they send the message that it is his decision, not the government's, whether to admit outsiders into the privacy of his home. Accordingly, "[i]t reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding." *Ibid.*

But it undermines the rule of law when "the citizen * * * advise[s] the police of his or her wishes" that they *not* enter his or her home and, rather than "act in reliance on that understanding," *Drayton*, 536 U.S. at 207, the police override it and enter anyway—without resort to the legal procedures (*e.g.*, obtaining a warrant) that serve as bulwarks of individual liberty. That is what happened here. Petitioner's explicit exercise of his constitutional right to refuse consent for a warrantless search of his home should have been dispositive. See

Randolph, 547 U.S. at 120. Rather than accept that result—or recur to a neutral magistrate to obtain a search warrant—the police procured petitioner's absence, disregarded his express objection, and conducted the search with the permission of his co-tenant, Ms. Rojas. Whatever the officers' subjective motivation, their conduct sends a clear and dangerous message: Individual choice will be respected only when it suits the government's purposes; when it does not, the police will engineer other means to the same end. That heads-the-government-wins, tails-the-citizen-loses approach demeans the dignity of voluntary agreement, and the individual's sovereignty over his own affairs, on which our social order rests.

Such an approach also taints the concept of consent in other ways. It creates the grave risk that a co-tenant's subsequent consent will not be truly voluntary, but instead tainted by official pressure. Here, for example, the search of petitioner's home was premised on the putative consent of Ms. Rojas. But Ms. Rojas did not invite the police into her home at the time petitioner told them "I know my constitutional rights" and "[y]ou can't come in." J.A. 77. And while the police perfunctorily asked Ms. Rojas if they could enter when they first arrived, she "didn't even get to answer" before officers "all just came in," seizing petitioner before her eyes. J.A. 92. Detective Cirrito later returned to her home and his fellow detective "pulled [Ms. Rojas's four-year-old] son outside" and "started questioning [him] without [her] permission"; when Ms. Rojas objected, she was told the officers could "take [her] kids from [her] right now." J.A. 93. That conduct could not help but make clear to Ms. Rojas that, whatever her wishes, the police would decide for them-

selves whether to respect them.[3] It is thus hardly a surprise that Ms. Rojas proceeded to sign a consent-to-search form. By then, she naturally "felt like [she] had no rights" and "was pressured into even giving them a consent." J.A. 93.

Such conduct sends the wrong message and undermines healthy government-citizen relations. Our society rests critically on the principles of individual responsibility, voluntary agreements, and self-determination. If those concepts are to have meaning, decisions regarding whether to allow or deny entry into the home must be respected by law enforcement, no less than they are respected by private individuals. Even where the police merely arrest a resident who refuses consent and then seek consent from an occupant who remains, that sequence of events undermines the voluntariness of any "consent" that follows. It also teaches the citizenry a lesson—that their wishes will not be respected unless the police so desire—that one would hope never to find in any civics textbook. This Court should not embrace a rule that would make such lessons commonplace.

The rule adopted below also creates a dangerous incentive for false accusations. If one co-occupant genuinely does want the police to search the premises over another's objection, she would merely need to inculpate the other co-occupant—rightly or wrongly—to defeat the objection. With a few simple words—"Yes, I saw him

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[3] This Court has recognized that, where police make an "implied threat"—"no matter how subtly" conveyed—"the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 228 (1973). Here, Ms. Rojas was exposed not merely to the implied threat of arrest, but an explicit threat that her children would be taken away.

with the stolen jewelry"—the inviting co-tenant could create probable cause to have the objector arrested and removed, enabling herself to give the police permission to search. That result cannot be squared with *Randolph*'s statement that "when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority." 547 U.S. at 113-114. Indeed, it *literally* allows the inviting co-occupant to force her preferred resolution by appealing to the authorities: "Officers, arrest that man!" The right to "bid defiance to all the forces of the Crown," *Miller*, 357 U.S. at 307, by refusing consent to enter should not be so easily circumvented.

3. That the police will often have probable cause to arrest the objecting inhabitant makes no difference. Probable cause to arrest (whether provided by another occupant or obtained independently) means only that the police may legitimately restrain and remove the objector. It does not mean that the police can nullify his explicit and otherwise controlling objection to a search of his home. This Court has rejected the notion that an individual's arrest is occasion for a full-bore "warrantless search of [the arrestee's] entire house." *Chimel* v. *California*, 395 U.S. 752, 755 (1969). Rather, a person's arrest licenses police only to secure "the area 'within his immediate control,'" *id.* at 763, and perhaps to conduct a "cursory" protective sweep that "lasts no longer than is necessary to dispel [a] reasonable suspicion of danger," *Maryland* v. *Buie*, 494 U.S. 325, 335-336 (1990).[4] In the absence of a warrant, neither a person's arrest, nor disputed consent, nor their combination should justify an hours-long, intrusive search through his home and pos-

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[4] Indeed, here the police *did* conduct a protective sweep at the time of petitioner's arrest. Pet. Br. 3.

sessions. This Court has never recognized such an exception to the Fourth Amendment's warrant requirement. It should decline to do so here.

B. Property Law Reflects The Deeply Ingrained Social Expectation That An Outsider Cannot Enter A Home Over A Resident's Clear Objection By Obtaining Another's Consent

Randolph recognized that a "co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant." 547 U.S. at 114. Neither may a co-tenant admit a stranger immediately after the objecting co-tenant has left (or been removed from) the doorstep. Longstanding property law reflects society's understanding that an occupant's previously and unequivocally stated desire to exclude outsiders from his home does not lose force simply because he is absent at the precise moment the outsider crosses the threshold. Whether viewed through the lens of property law or common sense, the result is the same: The prior objection of one co-tenant renders a later invitation from another ineffective.

1. "[T]he right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994) (quotation marks omitted). By extension, co-tenants who share ownership or possession also share in the right to exclude.[5] No co-tenant may ex-

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[5] 7 *Powell on Real Property* § 50.06[1] (M. Wolf ed., 2005) ("In actions against outsiders to try title, or for ejectment, or for possession, the individual tenant in common may generally sue alone, with the outcome applicable to all cotenants." (footnotes omitted)); *id.* § 52.03[4] ("Each tenant by the entirety is entitled to * * * protect [the property] against outsiders * * * ."); 4 *Thompson on*

clude any other co-tenant; each has an equal right to full use and enjoyment of the premises. But neither may a co-tenant interfere with another co-tenant's quiet enjoyment of the property. 7 *Powell on Real Property* §50.03[1] (M. Wolf ed., 2005) ("Each cotenant * * * has the right to use and enjoy the entire property as if he or she were the sole owner, limited only by the same right in the other cotenants.").

That limit on each tenant's use forecloses one from bringing unwanted visitors onto the property when another makes his objection known:

> A license * * * to a stranger, if availed of by the licensee, does involve an interference with the possession of the others, and the licensee can, it would seem, justify his entry only on the theory that the licensor had authority to act on behalf of the others in granting such a license. In so far as the license involves a permission merely to enter on the land, * * * an authority in one cotenant to grant such a license in behalf of all might well be inferred, but if one cotenant has implied authority to grant the license, any other cotenant should have implied authority to revoke it, the effect of which would be that *the license is valid only until one of the cotenants expresses his dissent.*

2 H. Tiffany & B. Jones, *The Law of Real Property* §457, at 274-275 (3d ed. 1939) (emphasis added); see also 20 Am. Jur. 2d *Cotenancy and Joint Ownership* §94 (1965) ("In the absence of authorization or ratification on the

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Real Property §31.07(d) (D. Thomas ed., 2004) ("Because each joint tenant is entitled to possession of the whole, each is enabled to defend the estate against strangers. Title may be vindicated and trespassers removed from any part by an action of ejectment brought by any joint tenant.").

part of the cotenants, any dealing on the part of one co-tenant in relation to the common property is a nullity insofar as their interests are concerned."). In other words, any co-tenant may veto another's desire to admit an outsider.

A co-tenant thus does not lose his right to forbid entry to an outsider, even one putatively licensed by another co-tenant, simply because he is not standing sentry over the property at the moment of trespass. If that veto is effective when voiced *after* the visitor has entered the property, see Tiffany & Jones, *supra*, § 457, at 275, *a fortiori* it is effective when exercised preemptively. After all, no reasonable person would infer "authority in one cotenant to grant such a license in behalf of all," *ibid.*, where another co-tenant had previously and unequivocally forbidden entry in the presence of both the interloper and the inviting co-tenant. Cf. *Restatement (Second) of Agency* § 158(b) & cmt. b (1958) (any authority, real or apparent, vanishes once it is expressly revoked).

Without a valid license, an entry upon another's property is trespass. See *Jardines*, 133 S. Ct. at 1415 ("'[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbor's close without his leave.'" (quoting *Entick* v. *Carrington*, 2 Wils. K.B. 275, 291, 95 Eng. Rep. 807, 817 (K.B. 1765)). Thus, when the police receive one resident's clear command to stay out of his home; secure that objector's absence from the scene; and seek another tenant's permission to enter and search, they have committed the sort of common-law trespass against which, "at a minimum," the Fourth Amendment protects. *United States* v. *Jones*, 132 S. Ct. 945, 953 (2012); see *Jardines*, 133 S. Ct. at 1415 ("unlicensed physical intrusion" constitutes search under Fourth Amendment).

2. For more than four centuries, moreover, the common law has declared that one tenant may not act to the "prejudice" of his co-tenant's interests in the estate. See *Rothwell* v. *Dewees*, 67 U.S. 613, 619 (1862) ("it would be inequitable to permit one of [two tenants-in-common] to do any thing to the prejudice of the other"); *Tompkins* v. *Superior Court of City & Cnty. of S.F.*, 378 P.2d 113, 116 (Cal. 1963) ("Neither a joint tenant nor a tenant in common can do any act to the prejudice of his cotenants in their estate"); A. Freeman, *Cotenancy and Partition* § 174, at 235-236 (2d ed. 1886) ("Every act done by one joint-tenant which is for the benefit of his companions will bind them; but those acts which prejudice his companions in estate will not bind them."); *Bartlet* v. *Harlow*, 12 Mass. 348, 352 (1815) ("[I]t is laid down as a general principle, that one joint-tenant cannot prejudice his companion in estate, or as to any matter of inheritance or freehold"); 2 W. Blackstone, *Commentaries on the Laws of England* 183 (1768) ("But one joint-tenant is not capable by himself to do any act, which may tend to defeat or injure the estate of the other; as to let leases, or to grant copyholds"); *Rud* v. *Tooker*, 2 Coke 66a, 68b, 76 Eng. Rep. 567, 572 (K.B. 1601) ("[E]very act done by one joint-tenant in benefit of himself and his companion, is good * * * but one joint-tenant cannot prejudice his companion, as to any matter of inheritance or freehold").

The common law, for nearly as long, has forbidden cotenants from corrupting or destroying shared property. See, *e.g.*, 20 Am. Jur. (2d) *Cotenancy and Joint Ownership*, *supra*, § 87 ("When one tenant in common destroys the subject of the tenancy, a trespass action may be instituted by the injured party"); *Young* v. *Ledford*, 37 So. 3d 832, 835 (Ala. Ct. App. 2009); *Cathcart* v. *Malone*, 229 S.W.2d 157, 158 (Tenn. Ct. App. 1950); *Sullivan* v.

Sherry, 111 Wis. 476 (1901) ("[I]f a cotenant * * * destroys the common property or converts it to his own use, he may be sued in trespass or trover to redress the wrong wherever such a remedy would exist in the absence of the relationship between cotenants"); Freeman, *supra*, §251, at 331; *Symonds* v. *Harris*, 51 Me. 14, 19 (1862); *Mersereau* v. *Norton*, 15 Johns. 179 (N.Y. Sup. Ct. 1818); Blackstone, *supra*, at 183 ("[I]f any waste be done, which tends to the destruction of the inheritance, one joint-tenant may have an action of waste against the other"); E. Coke, *Institutes of the Laws of England* 200-201 (1629) (explaining that "if two Tenants in Common bee of a Parke, and one destroyeth all the Deers, an Action of Trespass lieth"; likewise, "if two severall owners of houses have a river in common betweene them, if one of them corrupt the river, the other shall have an Action on the Case").

Those common-law principles reflect the larger social understanding that co-tenants are expected (indeed, required) to respect each other's property and privacy interests. That precludes deliberate disregard of a co-tenant's express and pending objection, grounded in *a constitutional right*, to an otherwise impermissible warrantless search. The objecting co-tenant's right to exclude—that "most essential" property right, *Dolan*, 512 U.S. at 384, and one justifying legitimate expectations of privacy, *Rakas*, 439 U.S. at 149—is immediately and irreparably harmed if his co-tenant invites the police to search his possessions inside the home nonetheless. Once the right to be free of a search is infringed, it is destroyed forever. See *Covino* v. *Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992). To allow a consent search over an existing objection would all but obliterate an objecting co-tenant's essential right to exclude.

Four decades before this Court decided *Randolph*, the California Supreme Court reached precisely that conclusion, holding that police cannot rely on one co-tenant's consent to search over another's objection. In *Tompkins*, the police gained consent from one co-tenant to search an apartment he shared with Tompkins. 378 P.2d at 115. But when the police arrived at the apartment, key in hand, Tompkins refused to allow them in, slamming the door in an officer's face. The officer then kicked in the door and entered the apartment. *Ibid.* Citing the common law rule against prejudice between co-tenants, Justice Traynor rejected the State's argument that the first co-tenant could grant the police power to kick in the door over Tompkins's objection. *Id.* at 116. Rather, "[j]oint occupancy of property, particularly residential property, obviously demands reasonable restrictions on the right of each joint occupant either by himself or through another to exercise full control over the property at all times regardless of the wishes of another joint occupant present on the premises." *Ibid.* "[A] joint occupant's right of privacy in his home is not completely at the mercy of another with whom he shares legal possession." *Ibid.*

As *Tompkins* explained, any power by one co-tenant to allow a search over another co-tenant's objection must be subject to "reasonable restrictions." 378 P.2d at 116. This Court has recognized that it is reasonable for one co-tenant to have authority to make choices for other cotenants who are absent or asleep. See *Matlock*, 415 U.S. at 170-171. The police thus may presume, absent contrary indication, that a co-tenant on the property impliedly speaks for all. But it is just as surely *un*reasonable for one co-tenant to allow a search where another cotenant is present and objecting. *Randolph*, 547 U.S. at

120.[6] And nothing makes it more reasonable for one co-tenant to license the police to search over another's objection simply because the police have procured the objecting co-tenant's absence by arresting him on the heels of his refusal to permit entry. Rather, *Tompkins*, and the common law's broader rule against prejudice of a co-tenant's interests, confirm that co-tenants cannot prejudice each other's already-invoked exercise of their constitutional rights.

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[6] In *Matlock*, this Court stated that "[t]he authority which justifies the third-party consent does not rest upon the law of property," but rather on the "reasonable * * * recogni[tion]" that, in ordinary co-tenancy arrangements, the co-tenants "have assumed the risk that one of their number might permit the common area to be searched." 415 U.S. at 171 n.7. To avoid unreasonable burdens for law enforcement, the police are generally "entitled to rely" on that assumption, without first "eliminat[ing] the possibility of atypical arrangements, in the absence of reason to doubt that the regular scheme was in place." *Randolph*, 547 U.S. at 111-112 (discussing *Matlock*). But where a resident makes clear that he in fact does *not* acquiesce in his co-occupant's admittance of outsiders—here, shouting at them to stay out as they stood at the threshold—that explicit notice renders any police reliance on "the regular scheme" flatly unreasonable. *Id.* at 112. A co-occupant's "common authority" to consent to a search of shared premises is "limit[ed]" by "specialized tenancy arrangements *apparent to the police*." *Id.* at 110 (citing *Chapman* v. *United States*, 365 U.S. 610 (1961)) (emphasis added). Moreover, to the extent this Court has suggested that "[t]he common authority that counts under the Fourth Amendment may * * * be broader than the rights accorded by property law," *ibid.* (citing *Illinois* v. *Rodriguez*, 497 U.S. 177, 181-182 (1990)), that view is at odds with the Court's more recent recognition that an expectations-based Fourth Amendment standard should be "'*added to*, not *substituted for*,' the traditional property-based understanding of the Fourth Amendment * * *." *Jardines*, 133 S. Ct. at 1417 (quoting *Jones*, 132 S. Ct. at 952).

II. THERE IS NO LEGITIMATE LAW ENFORCEMENT NEED TO CIRCUMVENT *RANDOLPH* BY ARRESTING AN OBJECTING OCCUPANT ON HIS DOORSTEP AND SEEKING CONSENT FROM OTHER OCCUPANTS

In evaluating whether the Fourth Amendment's "bar to unreasonable searches" has been violated, this Court also balances "competing individual and governmental interests." *Randolph*, 547 U.S. at 115 (citing *Camara* v. *Mun. Court of City & Cnty. of S.F.*, 387 U.S. 523, 536-537 (1967)). Commonsense social expectations, individual autonomy, and respect for the rule of law all weigh against allowing the police to enter a private home by forcibly removing an objecting resident and seeking consent to search from another occupant. On the other side of the ledger stands the governmental interest in investigating and halting criminal activity. But holding police to the warrant requirement in cases like this one threatens no legitimate law enforcement function. Where there is probable cause to arrest an objecting inhabitant, there often will be probable cause to search as well. Adhering to the warrant requirement would mean only that the police must endure the ordinary inconvenience involved in obtaining a warrant. And the law amply accommodates any other putative law enforcement need.

A. No Legitimate Law Enforcement Need Supports Reliance On Disputed Consent To Search An Objecting Individual's Home

The Fourth Amendment provides an obvious and time-honored means for police to enter a private residence over a citizen's objection: If officers have probable cause to search a home, they may—and should—seek a warrant. Indeed, "[i]t is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreason-

able." *Payton*, 445 U.S. at 586 (quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 477-478 (1971)). "A warrant authorized by a neutral and detached judicial officer is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime." *Lo-Ji Sales* v. *New York*, 442 U.S. 319, 326 (1979) (quotation marks and citation omitted).

Adhering to the warrant requirement represents no impediment to legitimate law enforcement activity. Where the police have probable cause to arrest an individual in his home, the necessary cause to support a search warrant rarely will be absent. "Clearly, the police often have probable cause to search when they have probable cause to arrest." T. Clancy, *What Constitutes an "Arrest" Within the Meaning of the Fourth Amendment*, 48 Vill. L. Rev. 129, 178 n.276 (2003). To be sure, the standard for arrest and for search are not identical: Probable cause to believe an individual has committed a crime, and probable cause to believe *the home to be searched will contain evidence* of that crime, are not one and the same. 2 W. LaFave, *Search and Seizure* §3.1(b) (5th ed. 2011). But where, as here, a suspect is arrested at or near his residence, it will often "be permissible to infer that the instrumentalities and fruits of that crime are presently in that person's residence." *Ibid.*[7]

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[7] See, *e.g.*, *United States* v. *Tate*, 586 F.3d 936, 942-943 (11th Cir. 2009) (upholding finding of probable cause to search residence based on same information used to justify arrest); *United States* v. *Hobbs*, 509 F.3d 353, 362 (7th Cir. 2007) (probable cause existed for issuance of warrant to search defendant's house where he was caught carrying contraband immediately upon leaving his house); *United States* v. *Jones*, 159 F.3d 969, 974-975 (6th Cir. 1998) (search warrant for drug dealer's house valid where drug sales observed on "the premises rather than inside the house"); *United States* v. *Singleton*, 125

The law amply addresses law enforcement's other needs. If immediate action is necessary to preserve evidence, the exigent circumstances doctrine allows police to prevent its destruction. *Randolph*, 547 U.S. at 116 n.6 (citing *Schmerber* v. *California*, 384 U.S. 757, 770-771 (1966)).[8] Police in hot pursuit of a fleeing suspect may follow him into a home without a warrant. *Warden, Md. Penitentiary* v. *Hayden*, 387 U.S. 294, 298 (1967). And officers do not need a warrant to intervene on behalf of an injured resident or to protect her from imminent injury. *Brigham City* v. *Stewart*, 547 U.S. 398, 403 (2006). That law enforcement prerogative extends to suspected cases of domestic violence:

F.3d 1097, 1102-1103 (7th Cir. 1997) (probable cause existed where two controlled drug sales occurred "in the vicinity of the" house ultimately searched); *Holmes* v. *State*, 796 A.2d 90, 98 (Md. 2002) (upholding search warrant for petitioner's home where officer arrested petitioner for drug possession a block away); see also *United States* v. *Williams*, 544 F.3d 683, 688 (6th Cir. 2008) (noting "other circuits which have held, in cases involving a variety of suspected crimes, that an issuing judge may infer that a criminal suspect keeps the 'instrumentalities and fruits' of his crime in his residence"); *United States* v. *Laury*, 985 F.2d 1293, 1314 (5th Cir. 1993) (upholding warrant for search of bank robbery defendant's home based on testimony that those "who commit bank robberies tend to keep evidence and instrumentalities of their robberies in their personal possession, as well as their homes"); *People* v. *Carrington*, 211 P.3d 617, 635 (Cal. 2009) ("When property has been stolen by a defendant and has not yet been recovered, a fair probability exists that the property will be found at the defendant's home."); *State* v. *Gathercole*, 553 N.W.2d 569, 574 (Iowa 1996) (declaring that "it is reasonable to infer that stolen property would be found at a defendant's residence").

[8] Rather than invade the home of a person they believe might destroy evidence, the police may briefly detain that person outside the home for the time it takes to obtain a warrant. *Illinois* v. *McArthur*, 531 U.S. 326, 328 (2001).

> No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists, it would be silly to suggest that the police would commit a tort by entering, say, to give a complaining tenant the opportunity to collect belongings and get out safely, or to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur, however much a spouse or other co-tenant objected.

Randolph, 547 U.S. at 118. Once lawfully inside, moreover, the police may lawfully seize evidence in plain view without a warrant. *Texas* v. *Brown*, 460 U.S. 730, 737-739 (1983) (plurality opinion). That evidence, in turn, may supply probable cause for a warrant authorizing a more thorough search.

The doctrines of exigent circumstances, hot pursuit, and plain view amply meet the legitimate needs of law enforcement. Those finely tuned and time-honored doctrines properly accommodate law enforcement interests in maintaining public safety and order, on the one hand, and the right of private citizens to be free of unreasonable government intrusion into the sanctity of their private spaces, on the other.

B. The Warrant Requirement Imposes No Unreasonable Burden

Requiring officers to obtain a warrant in these circumstances is not an unreasonable burden. As NACDL members understand, "the overwhelming majority of warrant applications submitted to judges are approved." M. Hirsch, Fourth Amendment Forum, Featured Column, 30 Champion 50, 51 (Apr. 2006); see also R. Van Duizend *et al.*, *The Search Warrant Process: Preconcep-*

tions, Perceptions, Practices 27 (Nat'l Ctr. for State Courts 1985) ("*NCSC Study*") ("[T]he rate of outright rejection [of warrant applications] is extremely low. Most of the police officers interviewed could not remember having a search warrant application turned down.").

Any administrative burden involved in obtaining a warrant likewise offers little reason to abrogate the warrant requirement. "[T]he inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate," this Court observed long ago, "are never very convincing reasons and, in these circumstances, certainly are not enough to bypass the constitutional requirement" of obtaining a warrant. *Johnson* v. *United States*, 333 U.S. 10, 15 (1948).

Legislative initiatives and technological innovation have rendered that statement all the more true today. Since the advent of telephonic search warrants in the 1970s, police officers have been able to obtain search warrants from the field and in far less time than the roughly two hours that elapsed between petitioner's arrest and Ms. Rojas's execution of the consent form here. For example, as early as 1973, one district attorney's office in California estimated that "95 percent of telephonic warrants take less than 45 minutes." *People* v. *Blackwell*, 195 Cal. Rptr. 298, 302 n.2 (Ct. App. 1983); cf. *NCSC Study*, *supra*, at 4, 26 & tbl.7 (average length of review of warrant applications in a major Southern city was two minutes and forty-eight seconds). And States have continued to streamline warrant procedures apace with developments in technology, enabling police, prosecutors, and judges to navigate the entire process in cyberspace using tools such as mobile phones, e-mail, and video conferencing. See *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1561-1562 (2013).

The California statute authorizing electronic warrants—which the officers here never utilized—spells out a typical process:

- An officer or other affiant testifying in support of the warrant application takes an oath during a telephone conversation with a magistrate, Cal. Penal Code § 1526(b)(2)(A);
- The affiant affixes a digital signature to her affidavit and e-mails it to the magistrate, *ibid.*;
- The magistrate confirms receipt of the affidavit and supporting materials, verifying their contents and the digital signature, *id.* § 1526(b)(2)(B);
- If the magistrate decides to issue the warrant, she e-signs the warrant, notes the date and time of issuance on the warrant, and indicates that the oath was administered orally, *id.* § 1526(b)(2)(C); and finally,
- The magistrate e-mails the approved warrant back to the affiant, who is then authorized to write "duplicate original" on the warrant and execute it, *id.* § 1526(b)(2)(D).

See generally B.E. Witkin *et al.*, *California Criminal Law, Illegally Obtained Evidence* § 126, at 898-899 (4th ed. 2012). One California county has not only adopted e-signature technology for executing warrants, but has also issued judges iPads for after-hours review and sign-off of warrant applications. See S. Rich, *Search Warrants with E-Signatures Come to California*, Government Technology (Apr. 6, 2012), http://www.govtech.com/public-safety/Search-Warrants-With-E-Signatures-Come-to-California.html. And California hardly stands alone: Thirty-six States have authorized the use of telephone,

radio, e-mail, and other telecommunications technologies to obtain warrants remotely. See *McNeely*, 133 S. Ct. at 1562 n.4 (listing statutes of 35 States authorizing electronic warrant procedures at time of decision); 2013 Fla. Laws, ch. 247, §2 (amending Florida law to allow electronic warrant applications and electronic signatures as of July 1, 2013). The Federal Rules of Criminal Procedure similarly endorse the use of "telephone or other reliable electronic means" to apply for and issue search warrants. Fed. R. Crim. P. 4.1, 41.

C. The Balance Of Competing Interests Strongly Favors Adhering To The Warrant Requirement

For the reasons given above, adhering to the warrant requirement imposes no impediment to legitimate law enforcement interests. By contrast, warrantless searches of the home, based on a co-occupant's putative consent after police have arrested an objecting resident, seriously intrude upon individual privacy interests. The sanctity of the home ceases to be protected by the intervention of a neutral and detached magistrate. And privacy and dignity interests that property law has long protected, by precluding co-tenants from allowing invasions by outsiders over another resident's objection, lose all protection whenever the invading outsiders are government agents with the power to arrest.

More fundamentally, the tactic used here undermines the notions of civic responsibility and mutual respect that undergird our society. As explained above, consent searches are permissible because they respect both the value of mutual agreement and the citizen's sovereignty over himself, his home, and the possessions he keeps there. But allowing the police to arrest objecting residents and then seek consent from a co-tenant undermines respect for law enforcement; it instead teaches

citizens that their wishes, and their privacy, will be respected only if the police find that convenient. And, as the facts of this case illustrate, it undermines the voluntariness of consent generally: The objector's arrest graphically illustrates for all present that exercising one's rights may be costly indeed. "The warrant requirement * * * is not an inconvenience to be somehow 'weighed' against the claims of police efficiency." *Coolidge*, 403 U.S. at 481. And "the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *Mincey* v. *Arizona*, 437 U.S. 385, 393 (1978). Allowing warrantless police intrusion here would not advance law enforcement interests one iota, while the interests of personal privacy and security in the home would be gravely damaged. The balance here should favor the warrant requirement.

CONCLUSION

The judgment of the California Court of Appeal should be reversed.

Respectfully submitted.

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